Supreme Court U.S.
FILED

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No. 98-981380 FEB 25 '99

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In The

Supreme Court of the United States

October Term, 1998

MARTA A. LENTINO,

Petitioner,

v.

LOWELL T. CAGE,

Respondent.

On Petition For Writ Of Certiorari To The United States Court of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

QUESTION 1.

Whether the Fifth Circuit's "novel" conclusion that parties that did not file for bankruptcy can be named as Debtors in the District court orders conflict with 11 U.S.C. § 101(13) and amounts to both bad law and bad policy?

QUESTION 2.

Whether the Fifth Circuit's "novel" conclusion that the assets of a limited partnership that did not file for bankruptcy are assets of the individual debtor partner bankruptcy estate, conflicts with the Seventh Circuit decision in *Matter of Pentell*, 777 F.2d 1281 (7th Cir.1985), further with the decisions rendered in *In re Olszewiski*, 124 B.R. 743 (Bkrtcy.S.D.Ohio 1991), *In re Magnani*, 223 B.R. 177 (Bkrtcy.N.D.Iowa 1997), *In re Minton Group, Inc.*, 46 B.R. 222 (D.C.1985), *In re Dreske*, 25 B.R. 268 (Bkrtcy.E.D.Wis. 1982) and *In re Funneman*, 155 B.R. 197 (Bkrtcy.S.D.Ill. 1993), and further with 11 U.S.C. § 541(a)(1), the Uniform Partnership Act, and with the Texas Limited Partnership Act, Tex.Civ.Rev.Stat.Ann. art. 6132a-1 § 7.01?

QUESTION 3.

Whether the Fifth Circuit's "novel" conclusion that a bankruptcy trustee succeeds to a larger interest than the one held by the Debtor at the commencement of the case conflicts with 11 U.S.C. § 541(a)(1) and amounts to both bad law and bad policy?

QUESTIONS PRESENTED – Continued

QUESTION 4.

Whether the Fifth Circuit's conclusion that 11 U.S.C. § 541 allows the Chapter 7 Trustee to change the language of a contract executed under the laws of the State of Texas conflicts with said section and further with the decision rendered by the Fifth Circuit in *Matter of Maple Morgt., Inc.*, 81 F.3d 592 (5th Cir.1996), with the Dallas, Texas, Appellate court decision in *Treadgrill v. Farmers Ins. Exchange*, 912 S.W.2d 264 (Tex.App. – Dallas 1995)?

QUESTION 5.

Whether the Fifth Circuit's "novel" conclusion that a non-Debtor party to a state court proceeding in a remanded state court case, continues to be subject to the jurisdiction of the U.S. District Court conflicts with the Supreme Court of the United States' decision in *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 116 S.Ct. 1712, the Third Circuit decisions in *Trans Penn Wax Corp. v. McCandless*, 50 F.3d 217 (3rd Cir.1995), *Liberty Mut. Ins. Co. v. Ward Trucking Corp.*, 48 F.3d 742 (3rd Cir.1995), the Fourth Circuit decision in *In re Lowe*, 102 F.3d 731 (4th Cir.1996), the Ninth Circuit decisions on *Seedman v. U.S. Dist. Court for Cent. D. of Cal.*, 837 F.2d 413 (9th Cir.1988), *In re Conejo Enterprises, Inc.*, 96 F.3d 346 (9th Cir.1996) and the Second Circuit decision in *In re Cathedral of Incarnation in Diocese of Long Island*, 90 F.3d 28 (2nd Cir.1996), *rehearing denied*, 99 F.3d 66 (2nd Cir.1996)?

QUESTIONS PRESENTED – Continued

QUESTIONS 6.

Whether the Fifth Circuit's "novel" conclusion that the Automatic Stay Provision of 11 U.S.C. § 362(a) applies and enjoins actions against entities that have not filed a petition of relief under the title, conflicts with said Section and with the Third Circuit decision in *Accord Maritime Elec. Co. v. United Jersey Bank*, 959 F.2d 1194, 1205 (3rd Cir.1991) with the Seventh Circuit decision in *Martin-Trigona v. Champion Fed. Sav. & Loan*, 892 F.2d 575-577 (7th Cir.1989), with the Fifth Circuit's own decision in *First Wis. Nat'l Bank of Milwaukee v. Grandlich Dev. Corp.*, 565 F.2d 879, 880 (5th Cir.1978) and on *Matter of U.S. Abatement Corp.*, 39 F.3d 563 (5th Cir.1994) further with the decisions rendered *In re Bell & Beckwith*, 39 B.R. 914 (Bkrtcy. N.D.Ohio 1984), *In re Northwood Flavors, Inc.*, 202 B.R.63 (Bkrtcy.W.D.Pa. 1996), and *Mesiti v. Microdot, Inc.*, 156 B.R. 113 (D.N.H. 1993)?

QUESTION 7.

Whether the Fifth Circuits' conclusion that procedural law which entails substantive law needs not to be observed in bankruptcy proceedings, conflicts with the Due Process Clause of the Constitution of the United States, further with F.R.B.P. 7019; 9006(f) and with the District of Columbia Circuit's decision in *CNPq Conselho National v. Inter-Trade, Inc.*, 50 F.3d 56 (D.C.Cir.1995), with the Ninth Circuit decision in *Tushner v. U.S. District Court for Cent. Dist. of Cal.*, 829 F.2d 853 (9th Cir.1987) and with the Seventh Circuit decision in *Lerro v. Quaker Oats Co.*, 84

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F.3d 239 (7th Cir. 1996) and amounts to both bad policy and bad law?

LIST OF PARTIES

Parties to the Case

1. Petitioner Marta A. Lentino, party in interest, non debtor.

2. Eduardo P. Lentino, M.D., Debtor

3. Jorge A. Lentino, M.D., Debtor

4. Dov Avni Kaminetzky former Trustee of the E.L. and J.L. York Plaza Living Trusts and former general managing partner of the Lentino Family Limited Partnership.

5. Lowell T. Cage, Chapter 7 Trustee of the Bankruptcy Estates of Eduardo P. Lentino, M.D., and Jorge A. Lentino, M.D.

Counsel in the Case

5. Mrs. Marta A. Lentino, Pro-Se, 99 N. Post Oak Lane # 1207, Houston, Texas 77024.

6. Mrs. Theresa Mobley, Cage, Hill & Niehaus L.L.P. 5851 San Felipe, Suite # 950, Houston, Texas 77057, Attorney for Chapter 7 Trustee Lowell T. Cage.

7. Eduardo P. Lentino, M.D. Pro-Se 99 N. Post Oak Lane # 1207, Houston, Texas 77024.

8. Jorge A. Lentino, M.D. Pro-Se 121 N. Post Oak Lane # 2403, Houston, Texas 77024.

Other Interested Parties

9. George Salvador Lentino, vested remainder beneficiary of the J.L. York Plaza Living Trust.

10. Susana Raquel Lentino Shaefer, vested remainder beneficiary of the J.L. York Plaza Living Trust.

11. Cynthia Victoria Lentino, vested remainder beneficiary of the J.L. York Plaza Living Trust.

12. Fabiola Venesa Lentino, vested remainder beneficiary of the E.L. York Plaza Living Trust.

13. Michelle Marie Lentino, vested remainder beneficiary of the E.L. York Plaza Living Trust.

14. Natalia Lentino, vested remainder beneficiary of the E.L. York Plaza Living Trust.

15. Maria Raquel Lentino, Trustee of the E.L. and J.L. York Plaza Living Trust.

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PETITION FOR WRIT OF CERTIORARI

Petitioner Marta A. Lentino, respectfully requests that the Court grant the Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

ORDERS BELOW

Petitioners' Appendices provide the pertinent Orders.

JURISDICTION

Jurisdiction exists under 28 U.S.C. § 1254.

STATUTORY AND REGULATORY PROVISIONS INVOLVED

Petitioners' Appendices provide the pertinent Sections of the United States Code and Statutory Provisions Involved.

STATEMENT OF THE CASE

The United States Court of Appeals for the Fifth Circuit entered its judgment order without rendering an opinion on November 27, 1998.

Petitioner is a party in interest, an aggrieved person and is the non debtor or non filing spouse of Debtor Eduardo P. Lentino, M.D. Debtor Eduardo Lentino had

filed for bankruptcy individually. Petitioner had intervened in the bankruptcy proceedings to protect her beneficial interest under the Marital Trust "A" of the E.L. York Plaza Living Trust, a limited partner in the Lentino Family Limited Partnership.[1] Petitioner had also intervened

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[1] Petitioner has been married to Eduardo P. Lentino M.D. since 1970 and is the designated beneficiary under Trust "A" of the E.L. York Plaza Living Trust (97-CV-498 Doc. 27 Plaintiff Exhibit "A1", "A3").

The E.L. York Plaza Living Trust was created in 1986 and recorded of Public Record at the time. It contains a Spendthrift clause. The beneficiaries of the Trusts are the Lentino children who are his lineal descendants and Marta A. Lentino, the spouse of Debtor Eduardo Lentino, under the Marital Trust "A". None of these beneficiaries had filed for bankruptcy, therefore there was no concern and/or legal issue to be raised regarding any alienation of interest by the beneficiary in violation of the spendthrift provision. Additionally 11 U.S.C. § 541(C)(2) excludes "spendthrift trusts" from the bankruptcy estate if such trust protects the beneficiary from creditors under applicable state law. In the present case none of the beneficiaries under the Spendthrift Trust had filed for bankruptcy. None of these beneficiaries parties and/or the trustee of the Trust Maria Raquel Lentino were joined as necessary parties in the Adversary proceeding filed by the Chapter 7 Trustee (96-4795 Doc. 1) which was filed after two years of being appointed trustee (94-4735 Doc. 2). Petitioner had raised this issue on Appeal to the Fifth Circuit Court, relying therein in F.R.B.P. 7019, in the Due Process clause of the Constitution of the United States, further in *Sniadach v. Family Finance Corporation of Bay View*, 395 U.S. 337, 89 S.Ct. 1820 (1969) and *North Georgia Finishing, Inc. v. Di-Chem, Inc.*, 419 U.S. 601, 95 S.Ct. 719 (1975).

In its inception the Debtors were the trustee of each others' Trust. Debtors Lentino resigned to that position in 1993, a year prior to the filing of bankruptcy, (H 97-CV-498 Doc. 27 Plaintiff's Trial Exhibits "E4", "E5") and the successor Trustee Maria Raquel Lentino already designated in the Trust document

as a creditor of the bankruptcy estate of Debtor Eduardo Lentino pursuant to a contract that separated the

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since 1986 assumed that position. At the time of the creation of the trusts the stock of several corporations was gifted to the remainder beneficiaries of the Trust (the Children of Debtor Lentino) into the Trust, and appropriate Gift Tax was paid to the Internal Revenue Service (H-97-CV-498 Doc. 27. Plaintiff's Trial Exhibits "A5" and "A6"). The funds for the purchase of the stock was provided by the Debtors' father, a thoracic surgeon.

The Lentino Family Limited Partnership was created in 1988, six years prior to the debtors partners filing of the petition for relief in bankruptcy and properly recorded with the Secretary of the State of Texas at that time (H 97-CV-498 Doc. 27 Plaintiff's Trial Exhibit "C1", "C2"). The two Debtors Lentino (Eduardo and Jorge) held 1% general partnership interest. On or about 1988 the two Living Trusts (E.L. York Plaza Living Trust and J.L. York Plaza Living Trust) invested in the Lentino Family Limited Partnership and exchanged the stock which they held of several corporations into the Partnership in exchange for a 49% limited partnership interest each. (H 97-CV-498 Doc. 27 Plaintiff's Trial Exhibits "C3", "C4"; 94-45735 Doc. 133, Doc. 141; 96-4795 Doc. 6, Doc. 7, Doc. 8, Doc. 9, Doc. 10, Doc. 11). The Chapter 7 Trustee sold the assets of the corporations together with the stock that was under the Partnership, over objections, without warranty to ProCare of Houston L.L.C. the District Court for the Southern District of Texas gave clear title to ProCare of Houston L.L.C.

One of the corporations (See Chart in Appendix), Plaza Life and Energy Co. Inc., which was the holding corporation of Hospital Associated International Inc. (which corporation owned the stock of the 83 bed Hospital that the Chapter 7 Trustee sold, (the Hospital Corporation with all of its assets) had other shareholders in it, Charles and Ashraf Veldekens and Veldekens Inc., who were the minority shareholders, holding over a 47% stock ownership of such corporation. These minority shareholders had intervened in the bankruptcy proceedings of the Debtors Lentino to protect their rights (94-45736 Doc. 130 p. 121 L. 21-25, p. 128 L. 17-25, p. 129 L. 6-15; Doc. 129 p. 105 L.

property between husband and wife eleven years prior to the commencement of the Debtor's case. Petitioner had also objected to her spouse's reconversion to Chapter 7.[2]

12-16). These parties were not in bankruptcy neither was this corporation or any corporation sold by the Chapter 7 Trustee. Hospital Associates International was incorporated in 1978 and in good standing with the Secretary of the State of Texas at the time of Debtors filing their petition for relief, as well as York Plaza Hospital and Medical Center Inc., Plaza Life and Energy Inc., Baires Inc., York Plaza Real Estate Inc., Lentino Surgical Associates, Inc., P.A. Plaza Interpretation P.A. (which had other physicians involved in said Corporation), Plaza Ct. Ltd. (had also two other individuals in the partnership, who were not in bankruptcy) (H 97-CV-498 Doc. 27 Plaintiff's Trial Exhibit "B1").

[2] Petitioner had filed a Proof of Claim in the bankruptcy estate of her spouse stemming out of the wrongful termination of employment pre-petition of her spouse, by the state court appointed receiver which later acted as agent for the Chapter 7 Trustee. A detailed calculation of damages of which Petitioner was entitled under the contract was introduced in evidence supporting such (94-45735 Doc. 168 pp. 29-30; H 97-CV-498 Doc. 22 p. 30 L. 12 – p. 31 L. 8, p. 9 L. 11-14, p. 30 L. 12-25, p. 31 L. 1-7; 94-45735 Doc. 219 p. 20 L. 24 – p. 21 L. 1-3, p. 22 L. 23-25, p. 23 L. 21-23, p. 24 L. 18-25, p. 25 L. 6-9, p. 28 L. 21-25, p. 15 L. 14-25, p. 17 – L. 1 – p. 19 L. 25).

Debtor Lentino had moved for Chapter 11 reorganization after learning of the reversal of the multi-million dollar judgment which had rendered him insolvent (94-45735 Doc. 112, 94-45746 Doc. 80). Trustee had moved immediately for his reconversion to Chapter 7, four days after the Debtors had filed their motion, regardless what the Plan of Reorganization was going to propose (94-45735 Doc. 113; 94-45736 Doc. 81). The record also indicates that the Bankruptcy Estates were solvent and the Bankruptcy Court made its own calculation that it could pay the debts in four years (94-45736 Doc. 130 p. 210 L. 17, Doc. 129 p. 46 L. 1 – p. 54 L. 12). Other creditors objected to the reconversion (94-45735 Doc. 219 p. 88 L. 1 – p. 90 L. 2; 94-45736

Petitioner is also a co-defendant in a removed state court case which has been remanded to the state court by the District Court for the Southern District of Texas.[3]

Doc. 130 p. 210 L. 13-14) however, it proceeded to reconvert the Debtors in spite of their adoption of the Plan of Reorganization on file (94-45735 Doc. 166 pp. 1-107, Doc. 175; 94-45736 Doc. 107).

The fifth Circuit Court without addressing the legal issues raised by Petitioner affirmed the orders entered by the District Court for the Southern District of Texas.

[3] The financial reverses leading to Petitioner's spouse filing of bankruptcy stem primarily from an investment made by Dr. Lentino as a stockholder in Petrobank N.A. Financing was provided by a local bank, called Cullen Center Bank and Trust, which is today Frost National Bank by merger. The original loan was for 12 years renewable annually, at renewal time the bank reneged and obligated the Debtors to assume the debt of all the shareholders of Petrobank N.A. without receiving any consideration whatsoever, in order to obtain the renewal of his approximately $150,000 individual note. Said Cullen Bank sued debtor Lentino for breach of contract and after obtaining a liquidated judgment on the note in 1990 (which did not include the giving of proper credit for payment tendered nor the credits owed for the collateral pledged to the bank), the bank sued again in 1991 this time Petitioner who had not borrowed any monies was joined as a party defendant, on other grounds, by said Cullen Bank. The bank claimed the alleged amount due on the debt of all the shareholders of the Petrobank N.A. (Debtor Lentino's individual note was rolled together with all the shareholders of the bank into a master note in 1984) the case went to trial and the bank obtained a multi-million dollar judgment individually against the Debtors Lentino but not against Petitioner nor the Corporations, Trusts and/or Partnership, these entities were non-suited prior to trial. *See Appendix* for Opinion of Court of Appeals for the 14th District, Houston, Texas. This usurious judgment pushed the two Debtors into bankruptcy. Post-judgment the bank proceeded to

Petitioner has been enjoined by the District Court, on appeal, from the Bankruptcy Court, two and a half years

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collect on the unsuperseded judgment, moved for the appointment of a receiver for its own benefit and seized all the Debtors Lentino business and Corporations even though they were not judgment debtors, and having the bank judicially admitted to such. The Chapter 7 Trustee substituted parties for the Debtors and joined non Debtor Marta A. Lentino in the appeal of this usurious judgment to the 14th Court of Appeals, Houston, Texas, adopting the six points of error presented to the court prior to the filing of bankruptcy of the two debtors Lentino (Eduardo and Jorge), (94-45735 Doc. 85 pp. 1-7, Doc. 90 pp. 1-2, Doc. 97 pp. 1-4, Doc. 104). See *Lentino v. Cullen Center Bank and Trust*, 919 S.W.2d 743 (Tex. App. – Houston [14th Dist.] 1996, writ denied). The Court of Appeals for the 14th District, Houston, Texas reversed the multi-million dollar judgment before the Bankruptcy Court had authorized the sale of the assets and stock of various corporations whose ownership was under the Lentino Family Limited Partnership. The Chapter 7 Trustee had also joined non Debtor Marta A. Lentino on a petition for Writ of Error to the Supreme Court of Texas (H 97-CV-498 Doc. 131 pp. 54-62; 94-45735 Doc. 141 pp. 164-172). The chapter 7 Trustee relied therein in *Matthiessen v. Schaeffer*, 915 S.W.2d 479 (Tex. 1995) (per curiam), *Ennis v. Smith*, 883 S.W.2d 662, 663 (Tex. 1994) further on *Cf Puerto Rico Dep't of Consumer Affairs v. Isla Petroleum Corp.*, 485 U.S. 495 (1988) (Scalia J.) (there cannot be a "pre-emptive grin without a statutory cat"), on *Angelo Broadcasting v. Satellite Music*, 836 S.W.2d 726 (Tex. App. – Dallas 1992, writ denied) and on *ITT Commercial Finance Corp. v. Riehn*, 796 S.W.2d 248 (Tex. App. – Dallas 1990, no writ). The cases relied upon by the Trustee stand for the proposition that without an underlying recovery there can be no turnover relief. The Supreme Court upheld the reversal of the multi-million dollar judgment. Therefore the 14th Court of Appeals issued its Mandate and reversed the lower court final judgment. Petitioners raised on appeal to the Fifth Circuit Court the well-established principle of law of judicial estopel, which protects the courts by precluding parties from assuming a position in a

after the case has been remanded to state court, from participating in her own defense in said case and from

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legal proceeding that contradicts or is inconsistent with a position it had successfully asserted in a past proceeding, relying therein in *Delgrosso v. Spang & Co.*, 903 F.2d 234, 241 (3rd Cir. 1990), *cert. denied*, 498 U.S. 967, 111 S.Ct. 428, 112 L.Ed.2d 412 (1990), and *Murray v. Silberstein*, 882 F.2d 61 (3rd Cir. 1989).

The Chapter 7 Trustee, based on a turnover order issued by the state court post-judgment (on 06-08-94) when the judgment could not be superseaded and after learning of the reversal of the multi-million dollars judgment by the 14th Court of Appeals, wherein he adopted the two Debtors and non debtor Marta A. Lentino's legal position, prior to the development of the Adversary proceeding to see what interest "if any" the estates had in the Partnership, Trusts and Corporations, that it was proposing to sell, sold the assets of the Partnership and various Corporations, without warranty, and without joining the necessary parties for just adjudication, over objections. It should be mentioned here that the Chapter 7 Trustee had attempted to sell the assets of the partnership and corporations previously with warranty of title and the Bankruptcy Court had denied such request. (94-45735 Doc. 122, Doc. 133, Doc. 141, Doc. 163; 94-45736 Doc. 87, Doc. 100). A motion to stay the order of sale was denied by the Bankruptcy Court and was appealed to the district court who did not rule on it.

As stated above Petitioner has been a party defendant to the Cullen Bank litigation, no judgement was rendered by the jury against Petitioner except for the costs of court, but property which was held by Petitioner in Trust for her Children as the Trustee of the E.P. Lentino Children's Trust was ordered to be turned over to Cullen Bank, even though the E.P. Lentino's Children Trust was non-suited by Plaintiff. Petitioner appealed together with her spouse and the Chapter 7 Trustee, said erroneous judgment and the seizure of her spouse's business. The judgment was reversed on 02-29-96. The District Court for the Southern District of Texas totally precluded Petitioner from filing any papers in her own defense when the case was remanded for a new trial under penalty of a jail sentence (97-

asserting any claims against the Plaintiff. Petitioner, had been ordered to withdraw her pleadings from the state court case which included a counter claim, a notice of dismissal of her previous attorney, a motion for severance of proceedings, and a motion to reinstate her defenses and claims. For this filing petitioner was incarcerated for half a day. Petitioner continued to be enjoined by the district court after the automatic stay had been lifted which allowed the litigation to go forward.

Petitioner had appealed several judgment orders from the Bankruptcy Court for the Southern District of Texas and from the District Court for the Southern District of Texas. Despite the language of the Lentino Family Limited Partnership, (a Texas Limited Partnership), the Trust, which has a Spendthrift provision (a Texas Living Trust), and of the agreement that separates the property between husband and wife, the Bankruptcy Court, prior to the development of the Adversary proceeding to determine what interest "if any" the bankruptcy estate had in the assets of the Partnership, Corporations and Trusts that it was proposing to sell, authorized over objections the sale, without warranty to ProCare of Houston L.L.C. in breach of its own scheduling order, which order had set the Pre-Trial conference for months after the sale took place. The District Court for the Southern District of Texas, over objections, gave clear title of the assets of

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CV-498 Doc. 207 p. 50 L. 13-21, p. 54 L. 4-9, p. 55 L. 13-25) and concluded that Petitioner did not have any causes of action against the allegations of Plaintiff. Petitioner filed a Writ of Mandamus in the 5th Court of Appeals and a Petition for Writ of Certiorari in this Honorable court, both of which were denied.

Corporations whose stock ownership was with the Lentino Family Limited Partnership to ProCare of Houston L.L.C. The assets included an 83 bed Hospital with the land, the building, the accounts receivables and the equipment and the assets of several corporations some of them medical professional associations who had invested in real estate and who had other physicians involved. None of the corporations had filed for bankruptcy nor the Trusts or the Partnership.

Petitioner, who did not file for bankruptcy, had been named in all the orders entered by the District Court for the Southern District of Texas as a "Debtor" in bankruptcy.

Petitioner, further had objected to the Chapter 7 Trustee's employment of special counsel.[4] Trustee/

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[4] The Trustee proposed to hire for over a 50% contingency fee the prior attorneys of the Debtors and petitioner the first of which had abandoned the clients and had accepted a judgeship position out of town, and the appellate attorney which previously represented the two Debtors and non debtor Marta Lentino, on appeal of the lower Court judgment and the Corporations, Trusts and partnership in post-judgment and turnover proceedings, as separate entities. Due to the abandonment of the client by the previous attorney after accepting such judgeship position, which was also objected by the Chapter 7 Trustee (94-45735 Doc. 289 p. 2; Doc. 290 p. 2; 94-45735 Doc. 202 p. 2, Doc. 203 p. 2), and the conflict existing with the appellate attorney who previously had represented the trusts, partnership and corporations as separate entities, Debtors Lentino and petitioner had objected to such employment of counsel, on the proposed terms (94-45735 Doc. 271, 272, 273; 97-CV-498 Doc. 79, Doc. 80, Doc. 81, Doc. 82). The Bankruptcy Court for the Southern District of Texas denied the Chapter 7 Trustee's application with prejudice (H 97-CV-498 Doc. 142 pp. 78-81; 94-45735 Doc. 283) on the terms presented

Respondent proposed to employ the previous trial attorney that had abandoned its clients and had accepted a federal judgeship position out of town and the former Debtors Lentino and Petitioners' appellate attorney who has a conflict of interest stemming out of his representation post-judgment in the Cullen Bank litigation of the Trusts, Partnership and Corporations as separate entities. The Bankruptcy Court for the Southern District of Texas had denied the application with prejudice on the terms presented. The District Court for the Southern District of Texas approved the same prior to the expiration of time to file responses and objections it had ordered, over the timely filed objections by Petitioner.

The Fifth Circuit Court affirmed the orders of the District Court for the Southern District of Texas without entering its opinion and rationale for its clear departure from well-established law principles.

The Fifth Circuit's conclusion is both bad law and bad policy and directly conflicts with 11 U.S.C. § 101(13) which clearly defines a "Debtor" as a person or municipality concerning which a case under this Title has been commenced". Petitioner is the non filing spouse of Debtor Eduardo Lentino. The conclusion is dangerous and misleading because persons about to extend credit to Petitioner will be mislead by the District Court for the Southern District of Texas' orders.

Its conclusion is further dangerous and amounts to both bad law and bad policy by including assets of a limited partnership in the individual bankruptcy estate of

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and the District Court for the Southern District of Texas approved on original proceeding the same application.

the debtor partner which directly conflicts with a Seventh Circuit case with similar facts. See *Matter of Pentell*, 777 F.2d 1281 (7th Cir. 1985), with 11 U.S.C. § 101(41), with the Texas Limited Partnership Act Tex. Rev. Civ. Stat. Ann. art. 6132a-1 § 7.01 and with 11 U.S.C. § 541(a)(1).

Further, the Fifth Circuit conclusion that Petitioner is not a creditor of the bankruptcy estate of her spouse pursuant to the contract which separated the property between husband and wife, executed under the laws of the State of Texas, eleven years prior to the commencement of her spouse's bankruptcy case, is both bad policy and bad law and directly conflicts with 11 U.S.C. § 541 which does not authorize a bankruptcy trustee to change the language of a contract executed under the laws of the State of Texas nor to include the separate property of the non filing spouse as property of the bankruptcy estates and conflicts with a recent decision of the same Circuit, *Matter of Maple Mortg., Inc.*, 81 F.3d 592 (5th Cir. 1996), with *Treadgrill v. Farmers Ins. Exchange*, 912 S.W.2d 264 (Tex. App. – Dallas 1995).

The Fifth Circuit's conclusion is further bad policy and bad law and directly conflicts with a recent decision rendered by this Honorable Court with regards to the District court for the Southern District of Texas continuous exercise of its jurisdiction over a non debtor party defendant in a remanded state court case after it had retained nothing of the matter in its docket. Conflicting with *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 116 S.Ct. 1712 (1996) and with the Third Circuit's decisions in *Trans Penn Wax Corp. v. McCandless*, 50 F.3d 217 (3rd. Cir. 1995), *Liberty Mut. Ins. Co. v. Ward Trucking Corp.*, 48 F.3d 742 (3rd Cir. 1995), the Fourth Circuit decision in *In re*

Lowe, 102 F.3d 731 (4th Cir. 1996), the Ninth Circuit decisions in *Seedman v. U.S. Dist. Court For Cent. D. of Cal.*, 837 F.2d 413 (9th Cir. 1988), *In re Conejo Enterprises, Inc.*, 96 F.3d 346 (9th Cir. 1996) and the Second Circuit decision in *In re Cathedral of Incarnation in Diocese of Long Island*, 90 F.3d 28 (2nd Cir. 1996), *rehearing denied*, 99 F.3d 66 (2nd Cir. 1996).

The Fifth Circuit's conclusion is also bad policy and bad law by sustaining that the automatic stay provisions of 11 U.S.C. § 362(a) can enjoin actions against entities that have not filed a petition of bankruptcy when such actions are not against the Debtor and or the bankruptcy estates. The decision is in direct conflict with the decisions rendered in *First Wis. Nat'l Bank of Milwaukee v. Grandlich Dev. Corp.*, 565 F.2d 879, 880 (5th Cir. 1978) in *Accord Maritime Elec. Co. v. United Jersey Bank*, 959 F.2d 1194, 1205 (3rd Cir. 1991) further in *Martin-Trigona v. Champion Fed. Sav. & Loan*, 892 F.2d 575, 577 (7th Cir. 1989), which decisions stand for the proposition that counterclaims asserted by a debtor, in this case a non debtor, are not actions "against the debtor" which are subject to the automatic stay. Further conflicting with *In re Bell & Beckwith*, 39 B.R. 914 (Bkrtcy. N.D. Ohio 1984), further with *In re Northwood Flavors, Inc.*, 202 B.R. 63 (Bkrtcy. W.D. Pa. 1996), with *Mesiti v. Microdot, Inc.*, 156 B.R. 113 (D.N.H. 1993) and with *Matter of U.S. Abatement Corp.*, 39 F.3d 563 (5th Cir. 1994).

Petitioner asked the Court to exercise its certiorari jurisdiction and resolve the conflict between the Circuits, and settle these important questions of federal bankruptcy law: – the extent to which the non filing spouse of a Debtor can be named as a "Debtor" in the District Court orders sitting as intermediate appellate court and trial

court, – the extent to which assets of a Limited Partnership and Corporations that did not file for bankruptcy, are assets of the individual debtor partner bankruptcy estate. Further – the extent to which 11 U.S.C. § 541 authorizes a bankruptcy trustee to change the language of a contract executed under the laws of the State of Texas and to encompass separate property of the non filing spouse in the bankruptcy estate; – the extent to which a Bankruptcy Court can continue to exercise jurisdiction over a non debtor co-defendant in a state court action, after it had remanded the removed state court case to the state court and it had lifted the automatic stay allowing the litigation to go forward and – the extent to which procedural law which entails substantive law needs not to be observed in bankruptcy proceedings, in breach of the Courts' own orders.

REASONS FOR GRANTING THE WRIT

A. This is an appropriate case in which to grant the writ because it involves an important question of federal bankruptcy law – the extent to which a party in interest and creditor who did not file for bankruptcy, can be named as a "Debtor" in all the orders entered by the District Court sitting as intermediate appellate court and as a trial court.

According to the Fifth Circuit, "[t]he novel issue presented here is whether a District Court sitting as intermediate appellate court and trial court can encompass the non filing spouse as a 'Debtor' in all the orders it had entered, over objections" Petitioner did not file for bankruptcy (94-45735 Doc. 1; H 97-CV-498 Doc. 23 p. 20, Doc.

13, Doc. 37, Doc. 71, Doc. 221, Doc. 20) and is unaware of any other court that has considered the non debtor spouse of a Debtor as a "Debtor" in the bankruptcy appellate process and/or the bankruptcy proceedings. Nor the Bankruptcy Code nor the Bankruptcy Rules confer such power upon a bankruptcy appellate court and/or trial court. The decision of the Fifth Circuit conflicts with 11 U.S.C. § 101(13) which defines a "Debtor" as a person or municipality concerning which a case under this title has been commenced". Petitioner had not commenced a case under this Title. Petitioner had intervened as a creditor and party in interest. No other creditor that has intervened in these proceedings has been named as "Debtor" in the Court orders except Petitioner. (94-45735 Doc. 1) (94-45736 Doc. 1)

The Fifth Circuit's ruling is also bad law because persons who are about to extend credit to Petitioner will be mislead by the orders entered by the District Court and will not be able to rely on Petitioner's true declaration of not having filed a petition in bankruptcy. Because of the need for careful long term planning certainty and stability are essential in this area of the law. Rather than promoting stability the Fifth Circuit decision creates confusion, uncertainty and most important a split in authority with the Bankruptcy Code. Consequently, the Fifth Circuit's renegade ruling is especially dangerous and affect fundamental legal rights. Petitioner respectfully requests that this Court grant the writ, reverse the Fifth Circuit and the District Court for the Southern District of Texas.

B. This is an appropriate case in which to grant the writ in order to correct the conflict between the well-established principle of law of the Seventh Circuit, other circuits, the Uniform Partnership Act, and the Fifth Circuit's erroneous and dangerous conclusion that assets of a limited partnership that did not file for bankruptcy are assets of the individual debtor partner bankruptcy estate.

According to the Fifth Circuit, "[t]he novel issue presented here is whether a bankruptcy estate trustee succeeds to a larger interest, than the one held by the Debtor as of the commencement of the case." This issue is indeed "novel". Petitioner is unaware of any other court that has considered the matter as anything other than well-settled that "A partner has no interest in specific limited partnership property". Tex. Rev. Civ. Stat. Ann. 6132a-1, section 7.01. The Bankruptcy Courts have recognized that a bankruptcy trustee has no right to the assets of the partnership because such are not assets of the bankruptcy estates. *Matter of Pentell*, 777 F.2d 1281 (7th Cir. 1985) the Seventh Circuit concluded that it lacked subject matter jurisdiction over the assets of the partnership eventhough Debtor Christopher Pentell was the general partner and owned 30% interest in the partnership. In this case the record showed that Debtors Lentino held a 1% General partnership interest each in the Lentino Family Limited Partnership at the commencement of the case and the Bankruptcy Court for the Southern District of Texas as well as the District Court for the Southern District of Texas, Houston Division, should have recognized that it lacked subject matter jurisdiction over the individual limited partnership assets e.g. the corporations. *Pentell, supra* at 1285. *In re Magnani*, 223 B.R. 177

(Bkrtcy. N.D. Iowa 1997) the Court reached the same rationale that the partnership assets were not property of the Debtor's estate. *Magnani, supra* at 178. The Court further stated that for bankruptcy purposes the partnership is distinct legal entity separate from its partners. *Magnani, supra* at 178 and that a debtor's interest in property are determined by reference to state law citing *Johnson v. First National Bank of Montevideo,* 719 F.2d 270, 273-74 (8th Cir. 1983), *cert. denied,* 465 U.S. 1012, 104 S.Ct. 1015, 79 L.Ed.2d 245 (1984).

In re Funneman, 155 B.R. 197 (Bkrtcy S.D. Ill. 1993), the Illinois Court concluded that assets of partnership could not be administered in bankruptcy case of member partner *Funneman, supra* at 198. The Funneman Court further stated that the bankruptcy statute authorizing trustee to sell property free and clear of any interest in property of entity other than estate, authorized trustee to sell only debtor-partner's personal property interest in partnership and not property of the partnership itself quoting 11 U.S.C. § 363(f), *Funneman,* at 198. The Funneman Court also stated that consistent with the entity theory of partnerships embodied in the Uniform Partnership Act, the Bankruptcy Code accords a partnership a status of a "person", 11 U.S.C. § 101(41), and treats it as a separate legal entity distinct from the partners who create it, citing *In re Olszewski,* 124 B.R. at 746 and *In re Dreske,* 25 B.R. 268, 270 and concluded that as a result it is well settled that assets owned by a partnership are not included in the bankruptcy estate of an individual partner citing *In re Minton Group, Inc.,* 46 B.R. at 226 and *Turner v. Central Nat'l Bank of Mattoon, Illinois,* 468 F.2d 590, 591 (7th Cir. 1972).

Under the Lentino Family Limited Partnership the two Debtors Lentino held 1% general partnership interest each and the E.L. and the J.L. York Plaza Living Trusts are the limited partners, which did not file for bankruptcy, holding 49% limited partnership interest each. The chapter 7 trustee by law cannot succeed to a larger interest than the Debtor partner had at the commencement of the case, which is no interest in specific limited partnership property, and cannot as he did in this case proceed to liquidate the limited partnership assets, which included an 83 bed Hospital with the accounts receivables, the land, the building and the equipment and several corporations some of them medical professional associations, which had invested in real estate, with their assets and or administer as he did those assets.

Because the Fifth Circuit incorrectly determined an issue that should never arise, it had to acknowledge a lack of authority for its conclusion that the assets of a limited partnership are assets of the individual debtor partner bankruptcy estate. The Fifth Circuit did not issue an opinion stating its rationale supporting its clear departure from the well-established law principles.

The Trusts having transferred the stock in 1988 (six years prior to the Debtors' commencement of the case in bankruptcy) to the Lentino Family Limited Partnership no longer held title to the shares of stock, therefore the conclusion of the Fifth Circuit to merge the legal and equitable interest of the assets into the Debtors was clearly erroneous because as a matter of law a partner has no interest in specific limited partnership property since the general partners interest in a partnership is only personal property Tex. Rev. Civ. Stat. Ann. 6132a-1 § 7.01.

Because of the need for careful long-term planning, certainty and stability are essential in this area of the law. Rather than promoting stability, the Fifth Circuit decision is dangerous, creates confusion, uncertainty, and most important a split in authority with the Seventh Circuit, other Circuits, the Uniform Partnership Act, Tex. Rev. Civ. Stat. 6132a-1 § 7.01 and 11 U.S.C. § 541(a)(1).

Consequently, the Fifth Circuit's renegade ruling is especially dangerous, the Fifth Circuit acted as a legislative body rather than a judicial one, which primary concern should have been to apply the law to the facts. Petitioners respectfully request that this Court grant the writ, reverse the Fifth Circuit Court of Appeals, the District Court for the Southern District of Texas, and the Bankruptcy Court for the Southern District of Texas.

C. This is an appropriate case in which to grant the writ because it involves an important question of Federal Bankruptcy Law – the extent to which the assets of a limited partnership and corporations that did not file for bankruptcy become assets of the bankruptcy estate of the individual debtor partner.

The panel's "novel" conclusion that assets of corporations who did not file for bankruptcy can be encompassed in the Debtors' individual bankruptcy estates is indeed a "novel".

As a matter of federal statute, property of the estate is comprised of "all legal or equitable interest of the debtor in property as of the commencement of the case, 11 U.S.C. § 541(a)(1). A debtor's interests in property are

determined by reference to state law. *Johnson v. First National Bank of Montevideo*, 719 F.2d 270, 273-274 (8th Cir. 1983), *cert. denied*, 465 U.S. 1012, 104 S.Ct. 1015, 79 L.Ed.2d 245 (1984).

Tex. Rev. Civ. Stat. Ann. 6132a-1 § 7.01 specifically states that "A partner has no interest in specific limited partnership property" e.g. the corporations.

The corporations are separate judicial entities 11 U.S.C. § 101(41), who had behaved as such and nothing in the record indicates that the corporations had filed a petition for relief in bankruptcy, but rather that the individual debtors partners had. (94-45735 Doc. 1; 94-45736 Doc. 1). The Chapter 7 Trustee by law cannot encompass these parties who did not file for bankruptcy whose ownership rest with the Lentino Family Limited Partnership (94-45735 Doc. 133, Doc. 141; 97-CV-498 Doc. 27 Plaintiff's Exhibits "C1", "C2", "C3", "C4", 96-4795 Doc. 6, Doc. 7, Doc. 8, Doc. 9, Doc. 10, Doc. 11) in these two individual bankruptcy estates of the Debtors partners. Both the Bankruptcy Court and the District Court lacked subject matter jurisdiction over these assets.

Because the Fifth Circuit renegade ruling is especially dangerous and its conclusion unfortunate it further violates the Due Process Clause of the Constitution of the United States, Petitioners respectfully request that this Court grant the writ, reverse the Fifth Circuit and reverse the District court for the Southern District of Texas and the Bankruptcy court for the Southern District of Texas.

D. This is an appropriate case in which to grant the writ because it involves an important question of federal bankruptcy law – the extent to which 11 U.S.C. § 541 authorizes the bankruptcy trustee to change the language of a contract executed under the laws of the State of Texas.

Petitioner had separated the property between herself and Debtor Eduardo Lentino eleven years prior to her spouse's bankruptcy filing (94-45735 Doc. 168 p. 9). Despite the language of the contract, the claim of Petitioner submitted with evidentiary exhibits was struck by the Court (94-45735) Doc. 168 pp. 1-34, Doc. 219 p. 4 L.23-25). Petitioner is not aware of any other court who had interpreted that 11 U.S.C. § 541 authorizes a bankruptcy trustee to change the language of a contract executed under the laws of the State of Texas and or include the non filing spouses' separate property in the bankruptcy estate. The decision is in conflict with a Fifth Circuit Court prior decision in *Matter of Maple Mortg., Inc.*, 81 F.3d 592 (5th Cir. 1996) with *Treadgill v. Farmers Ins. Exchange*, 912 S.W. 2d 264 (Tex. App. – Dallas 1995), which stand for the proposition that a contract is a matter of law for the court to entertain and with 11 U.S.C. § 541.

Petitioner asks the court to exercise its certiorari jurisdiction and resolve this very important tissue of federal bankruptcy law.

E. This is an appropriate case in which to grant the writ because it involves an important question of Federal Bankruptcy Law – the extent to which a U.S. District Court can continue to exercise its jurisdiction over a non Debtor, party to a state court proceeding in a remanded state court case after it had remanded the removed state court case to the state court, leaving nothing of the matter in its docket and after it had lifted the automatic stay allowing the litigation to go forward.

The Panel's "novel" conclusion that the District Court can continue to exercise its jurisdiction over a non Debtor party to a state court proceeding over two years after it had remanded the case to the state court and after it had lifted the automatic stay allowing the litigation to go forward is indeed a "novel" and in direct conflict with the decision rendered by this Honorable Court in *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 116 S.Ct. 1712 (1996) and with other circuits' decisions. See *Trans Penn Wax Corp. v. McCandless*, 50 F.3d 217 (3rd Cir. 1995), *Liberty Mut. Ins. Co. v. Ward Trucking Corp.*, 48 F.3d 742 (3rd Cir. 1995), the Fourth Circuit decision in *In re Lowe*, 102 F.3d 731 (4th Cir. 1996), the Ninth Circuit decisions in *Seedman v. U.S. Dist. Court For Cent. D. of Cal.*, 837 F.2d 413 (9th Cir. 1988), *In re Conejo Enterprises, Inc.*, 96 F.3d 346 (9th Cir. 1996) and the Second Circuit decision in *In re Cathedral of Incarnation in Diocese of Long Island*, 90 F.3d 28 (2nd Cir. 1996), *rehearing denied*, 99 F.3d 66 (2nd Cir. 1996), which cases stand for the proposition that remand orders return cases to the state court, and that physical mailing of the certified copy of remand order to state court is key event to divest District court of jurisdiction.

Petitioner is a co-defendant in the state court action, had not filed for bankruptcy and had separated the property between husband and wife. Petitioner further had her individual causes of action in the state court case which actions are individual and peculiar to Petitioner. *In re E.F. Hutton Southwest Properties II, Ltd.*, 103 B.R. 808 (Bkrtcy. N.D. Tex. 1989) the Court concluded that not the current Bankruptcy Code nor Bankruptcy Rules of Procedure confer standing upon Trustee to assert individual actions. Further, to determine whether action belongs to estate or to individual creditors, bankruptcy court must look to injury for which relief is sought and consider whether it is peculiar and personal, or general and common to debtor and creditors, as whole *Hutton supra* at 809. The Fifth Circuit's conclusion is in direct conflict with the decision rendered in *Hutton supra*. The Chapter 7 Trustee had judicially recognized that Petitioner's causes of action are different from that of the Debtors but however did not represent a conflict to the bankruptcy estates (94-45735 Doc. 85). The Fifth Circuit conclusion creates uncertainty and confusion in an area of the law which certainty and stability are essential regarding jurisdictional issues as well as a split in authority with other circuits.

Petitioner asks the court to grant the writ and reverse the court of appeals and the District Court for the Southern District of Texas, resolve the conflict between the circuits, and settle an important question of federal bankruptcy law – the extent to which a District court can continue to exercise its jurisdiction over a non Debtor party to a state court case after it had remanded the case

to the state court and after it had lifted the automatic stay allowing the litigation to go forward.

F. This is an important case in which to grant the writ because it involves an important question of federal bankruptcy law – the extent to which a District Court can enjoin actions against entities that have not filed a petition of bankruptcy.

According to the Fifth Circuit, "[t]he novel issue presented here is whether 11 U.S.C. § 362(a) applies to "non Debtors". The issue is indeed "novel". Petitioner is unaware of any other court that has considered the matter as anything other than well-settled that "automatic stay provisions of the bankruptcy code does not apply to co-defendants, and although broad in scope, applies only to actions brought against debtor, nor to those brought by debtor". In the present case petitioner is not even a Debtor and her own individual causes of actions and defenses were against a third party non debtor. The Fifth Circuit conclusion is in conflict with the Third Circuit decision in *Accord Maritime Elec. Co. v. United Jersey Bank*, 959 F.2d 1194, 1205 (3rd Cir. 1991), the Seventh Circuit decision in *Martin-Trigona v. Champion Fed. Sav. & Loan*, 892 F.2d 575, 577 (7th Cir. 1989) and the Fifth Circuit decision in *First Wis. Nat'l Bank of Milwaukee v. Grandlich Dev. Corp.*, 565 F.2d 879 (5th Cir. 1978) *Matter of U.S. Abatement Corp.*, 39 F.3d 563 (5th Cir.1994), which decisions stand for the proposition that counterclaims asserted by a debtor. In this case a non debtor, are not actions "against the debtor" which are subject to the automatic stay.

The District Court for the Southern District of Texas was aware that Petitioner had not filed for bankruptcy (H 97-CV-498 Doc. 23 p. 20) and that was not pursuing any action against the Debtor and/or the bankruptcy estate, however it applied the provisions of 11 U.S.C. § 362(a) to Petitioner and stated that Petitioner had violated said Section of the Code and ordered Petitioner to withdraw all pleadings that she had filed in the state court action where Petitioner is a named defendant and sanctioned Petitioner for said filings (H 97-CV-498 Doc. 18, 20, 71).

Because the Fifth Circuit conclusion is in direct conflict with the decision rendered in other Circuits and constitutes a split in authority Petitioner asks the court to grant the writ, reverse the Fifth Circuit and the District court for the Southern District of Texas.

G. This is an important case in which to grant the writ because it involves an important question of Federal bankruptcy law – the extent to which procedural law which entails substantive law need not to be observed in bankruptcy proceedings in breach of the Court's Own orders.

The Fifth Circuit in a misguided attempt to do equity did not consider the legal issues raised by petitioner. The Bankruptcy Court had sold the assets of the Partnership and Corporations, together with the trusts in breach of its own scheduling order (96-4795 Doc. 2), further lacking subject matter jurisdiction over those assets, without joining any necessary parties as required by law for just adjudication, and took property without the due process required by law.

The Bankruptcy Court for the Southern District of Texas' rationale was that it was not going to try ownership title in regards to a Motion to Sell, despite the objections raised (94-45735 Doc. 249 p.13 L.4-7; Doc. 196; 96-4795 Doc. 2 p. 1). The decision creates a dangerous precedent and produced results that no right-thinking person would tolerate; conflicting with the due process clause of the Constitution of the U.S. and with F.R.B.P. 7019 which applies in adversary proceedings and requires the joinder of parties for just adjudication.

The District Court for the Southern District of Texas, on original proceeding, authorized the appointment of special counsels for the Chapter 7 Trustee entering its order prior to the expiration of the time prescribed by the same District Court to file responses and objections (regarding the conflict of interest that existed with one attorney and the abandonment of the clients by the other attorney), (H 97-CV-498 Doc. 75 p. 1, Doc. 79, Doc. 155 p. 10 L. 4-11, Doc. 80, Doc. 81, Doc. 82; 94-45735 Doc. 271, 272, 273, 274), over timely filed objections without a hearing to address such. Conflicting with the decisions rendered on *CNPq-Conselho National v. Inter-Trade, Inc.*, 50 F.3d 56 (D.C. Cir. 1995), *Tushner v. U.S. District Court for Cent. Dist. Of Cal.*, 829 F.2d 853 (9th Cir. 1987), *Lerro v. Quaker Oats Co.*, 84 F.3d 239 (7th Cir. 1996) which are cases that stand for the proposition that when there is a right or requirement to do some act or undertake some proceedings within a prescribed period after service of a notice or other paper and the notice or paper other than process is served by mail, three days shall be added to the prescribed period. *See* F.R.B.P. 9006(f).

CONCLUSION

The Fifth Circuit's "novel" conclusion that parties in interest and creditors can be named as "Debtors" in bankruptcy is especially dangerous, misleading and creates uncertainty and confusion into an area of the law in which certainty and stability are critical and produces unfortunate results. Further its "novel" conclusion that assets of a limited partnership that did not file for bankruptcy are assets of the individual debtor partner bankruptcy estate creates a dangerous precedent and injects uncertainty and confusion in this area of the law which is regulated by statute. Furthermore, its conclusion that 11 U.S.C. § 541 authorizes the changing of the language of a contract executed under the laws of the State of Texas and authorizes separate property to be treated as property of the bankruptcy estate produces unfortunate results and creates confusion in an area of the law where certainty and stability are essential. Furthermore, the Fifth Circuit's conclusion that a District Court can continue to exercise its jurisdiction in a remanded state court case over a non debtor party to said case, creates uncertainty and unstability regarding jurisdictional issues, a split in authority with other Circuits and with this Honorable Court and produces unfortunate results. The Fifth Circuit's further conclusion that the automatic stay provision of the Code enjoins actions against persons who did not file for bankruptcy, creates a real "novel", injecting uncertainty and confusion in this area of the law. And its "novel" conclusion that procedural law which entails substantive law needs not be observed in bankruptcy proceedings creates uncertainty and unstability and undermines the procedural statutes. In a nutshell there are no legal or

equitable doctrines or common law or bankruptcy policies which could justify the confiscation that took place, much less this draconian result in these facts. For these reasons, Petitioner asks the Court to grant writ of certiorari, reverse the Fifth Circuit Court of Appeals, the District Court for the Southern District of Texas and the Bankruptcy Court for the Southern District of Texas.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

No. 97-20524, 97-20800, 97-20805,
97-20806, 98-20008
(Summary Calendar)

Case No. 97-20524

In The Matter Of: JORGE A LENTINO MD;
EDUARDO P LENTINO MD,

Debtors,

MARTA A LENTINO, (Filed Nov. 27, 1998)

Appellant,

versus

LOWELL CAGE,

Appellee.

In The Matter of EDUARDO P LENTINO MD,

Debtor,

LOWELL CAGE,

Appellee,

versus

MARTA A LENTINO,

Appellant.

Case No. 97-20800

In The Matter Of: JORGE A LENTINO MD;
EDUARDO P LENTINO MD,

Debtors,

JORGE A LENTINO MD; MARTA A LENTINO;
EDUARDO P LENTINO MD; DOV AVNI KAMINETZKY,

Appellants,

versus

LOWELL CAGE,

Appellee.

In The Matter Of: EDUARDO P LENTINO MD,

Debtor,

LOWELL CAGE,

Appellee,

versus

JORGE A LENTINO MD; MARTA A LENTINO;
EDUARDO P LENTINO MD; DOV AVNI KAMINETZKY,

Appellants.

Case No. 97-20805

In The Matter Of: JORGE A LENTINO MD;
EDUARDO P LENTINO MD,

Debtors,

MARTA A LENTINO,

Appellant,

versus

LOWELL CAGE,

Appellee.

In The Matter Of: EDUARDO P LENTINO MD,

Debtor,

LOWELL CAGE,

Appellee,

versus

MARTA A LENTINO,

Appellant.

Case No. 97-20806

In The Matter Of: JORGE A LENTINO MD;
EDUARDO P LENTINO MD,

Debtors,

MARTA A LENTINO; EDUARDO P LENTINO MD;
JORGE A LENTINO MD,

Appellants,

versus

LOWELL CAGE

Appellee.

In The Matter Of: JORGE A LENTINO MD;
EDUARDO P LENTINO MD, also known as Eduardo P Lentino, also known as E P Lentino,

Debtor,

LOWELL CAGE, Trustee

Appellee,

versus

MARTA A LENTINO; EDUARDO P LENTINO MD; JORGE A LENTINO MD,

Appellants.

Case No. 98-20008

In The Matter Of: JORGE A LENTINO MD; EDUARDO P LENTINO MD

Debtors,

JORGE A LENTINO MD; EDUARDO P LENTINO MD; MARTA LENTINO; DOV KAMNINETZKY,

Appellants,

versus

LOWELL CAGE, Trustee

Appellee.

In The Matter Of: EDUARDO P LENTINO MD, also known as Eduardo Pedro Lentino, also known as E P Lentino; JORGE A LENTINO MD,

Debtors,

LOWELL CAGE, Trustee

Appellee,

versus

JORGE A LENTINO MD; EDUARDO P LENTINO MD; MARTA LENTINO,

Appellants.

Appeals from the United States District Court
For the Southern District of Texas
(H-97-CV-498, H-97-CV-1155 & H-97-CV-2130)

Before EMILIO M. GARZA, DeMOSS, and BENAVIDES, Circuit Judges.

PER CURIAM:*

Appellants, Eduardo P. Lentino ("E. Lentino"), Jorge A. Lentino ("J. Lentino"), and Marta A. Lentino ("M. Lentino") appeal various orders and judgments entered by the district court relating to estate assets and the administration of E. Lentino and J. Lentino's respective Chapter 7 and Chapter 11 bankruptcy estates. Appellant, Dov Avni Kaminetzky ("Kaminetzky") also appeals various district court judgments. After reviewing the record and the arguments of the parties, we find no abuse of discretion or other error by the district court. Accordingly, we AFFIRM the orders and judgments from which the Appellants appeal.

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*Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF TEXAS

IN RE:	JORGE P. LENTINO,	§	CIVIL ACTION H-97-498

IN RE:	JORGE P. LENTINO,	§	CIVIL ACTION H-97-500
	EDUARDO P. LENTINO,	§	H-97-745
	MARTA LENTINO,	§	H-97-914
		§	H-97-915
	DEBTORS,	§	H-97-922
			H-97-1155

Order to Consolidate

1. The appeals of debtors Jorge, Eduardo, and Marta Lentino, case numbers 97-500, 97-745, 97-914, 97-915, and 97-922, and 97-1155 are consolidated into this original appeal by Jorge Lentino, 97-498. The cases subsumed in the senior case by consolidation cease to have independent identities. All further filings must be made under this case number.

2. None of the bankruptcy court files may be copied in preparing this appeal. The district court has independent access to these files and will not tolerate this wasteful practice.

3. Marta Lentino's motion to extend time is denied.

4. The parties, including Jorge, Eduardo, *and* Marta Lentino, must appear for a hearing in this court on:

Wednesday, June 4, 1997
4:30 p.m.
Courtroom 11-C, Eleventh Floor
United States Court House
515 Rusk Avenue
Houston, Texas 77002.

Signed May 22, 1997, at Houston, Texas.

/s/ Lynn N. Hughes
Lynn N. Hughes
United States District Judge

UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF TEXAS

IN RE:	JORGE P. LENTINO,	§	CIVIL ACTION H-97-498
IN RE:	JORGE P. LENTINO,	§	CIVIL ACTION H-97-500
	EDUARDO P. LENTINO,	§	H-97-745
	MARTA LENTINO,	§	H-97-914
		§	H-97-915
	DEBTORS,	§	H-97-922
			H-97-1155

Judgment on Title

(Filed Jun. 16, 1997)

1. Title to all of the legal and equitable interests of these entities vested in the debtors' bankruptcy estates when the debtors filed their voluntary petitions for relief:

Hospital Associates International, Inc. (formerly known as Lentino Hospital Associates, Inc.);
Lentino Surgical Associates, P.A. (also known as Lentino Surgical Associates, Inc.); Little York Hospital, Inc.;
North Houston Energy, Inc.;
Plaza Life and Energy, Inc. (also known as Lamez Corporation);
Plaza Medical Group, P.A.;
Plaza Oil & Gas, Inc.;
Plaza Pipeline Company, Inc. (also known as Plaza Pipeline, Inc.);
Texas Trinity Energy Co., Inc.;
York Plaza Real Estate, Inc. (also known as York Plaza Hospital and Medical Center);

York Plaza Hospital and Medical Center, Inc.;
Plaza Cardiopulmonary Associates (also known as Plaza Interpretation, P.A.);
Plaza Life, Ltd. (also known as Plaza Court and as Plaza C.T., Ltd.);
York Plaza Professional Building, Inc. (also known as York Plaza Professional Building, Inc.);
Baires, Inc.;
Lentino Family Limited Partnership;
E. L. York Plaza Living Trust; and
J. L. Living Trust,

See 11 U.S.C. § 541

2. Title and possession of the legal and equitable interests in these entities vested in Pro Care of Houston, L.L.C., on January 14, 1997, when the trustee executed and delivered a special warranty deed and bill of sale:

Hospital Associates International, Inc.;
Plaza Life and Energy, Inc.;
York Plaza Hospital and Medical Center, Inc.;
York Plaza Real Estate, Inc.,
Little York Hospital, Inc.,
Lentino Family Limited Partnership,
J. L. York Plaza Living Trust,
E. L. York Plaza Living Trust; and
Baires, Inc.,

This includes real and personal property used by them in the operation of Northside General Hospital (formerly known as York Plaza Hospital).

Signed June 13, 1997, at Houston, Texas.

/s/ Lynn N. Hughes
Lynn N. Hughes
United States District Judge

IN THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF TEXAS

HOUSTON DIVISION

IN RE: JORGE A. LENTINO, DEBTOR	) CA NO. 97-CV-498)) HOUSTON, TEXAS) JUNE 4, 1997) 4:30 PA.M.

TRANSCRIPT OF HEARING PROCEEDINGS
BEFORE THE HONORABLE LYNN N. HUGHES

APPEARANCES:

FOR THE PLAINTIFF:
DR. EDUARDO LENTINO
MARTA LENTINO

FOR THE TRUSTEE:
THERESA D. MOBLEY
CAGE, HILL & NIEHAUS
5851 SAN FELIPE, #950
HOUSTON, TX 77057

for pro care:
EDGAR A. GOLDBERG
3700 BUFFALO SPEEDWAY, #900
HOUSTON, TX 77098

COURT REPORTER:
JACKIE SMITH
515 RUSK, #8016
HOUSTON, TX 77002

PROCEEDINGS RECORDED BY MECHANICAL STENOGRAPHY, TRANSCRIPT PRODUCED BY COMPUTER-AIDED TRANSCRIPTION

Jackie Smith, CSR (713) 250-5587

EXHIBIT "B"

* * *

[p. 20] THE COURT: You're not in bankruptcy.

MARTA LENTINO: No.

THE COURT: I understand that. But the people who had the judgment against them are here. Was a judgment entered against you; yes or no?

MARTA LENTINO: Only for the cost of court. Not a punitive judgment but only for the cost of court for 3,500 on something dollars. A judgement was entered against me, yes, Your Honor.

THE COURT: And you weren't an obligor on the note?

MARTA LENTINO: No, Your Honor but still the bank would come after me and present to the jury.

THE COURT: Maybe because you claim to own stuff that everybody else claims. You see, Judge West is going to handle that. As I understand it, what Judge West now has is the claim by the estate that what the bank required the doctors to do in renegotiating the note violated Texas usury law. And if they are right, the bank will pay money to the estate. The estate will pay it to the doctors' creditors and everybody will be happy. You have no role in that.

MARTA LENTINO: Your Honor –

THE COURT: You do not have my permission as a creditor of the doctors' estates to go pursue claims independent of the bankruptcy. That is a power that

* * *

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

IN RE:	§	CASE NO. 94-45735-H2-11
EDUARDO P. LENTINO, M.D.,	§	
DEBTOR	§	CASE NO. 94-45736-H5-11
JORGE A. LENTINO,	§	Jointly Administered
DEBTOR	§	(File in Underlined Case Number)

ORDER AUTHORIZING TRUSTEE TO SELL WITHOUT WARRANTY THE ESTATES' INTEREST IN STOCK, A LIMITED PARTNERSHIP, AND TRUST, FREE AND CLEAR OF LIENS, CLAIMS AND ENCUMBRANCES PURSUANT TO 11 U.S.C. §363(b) AND TO PARTIALLY ASSIGN CERTAIN DEFENSES AND CLAIMS

(Filed Jan. 07, 1997)

Came on for consideration the Trustee's motion for authority to sell without warranty the estates' interest in stock, a limited partnership, and two trusts, as described on Exhibit "A" attached hereto, free and clear of liens, claims and encumbrances pursuant to 11 U.S.C. §363(b), and to partially assign certain defenses and claims, and it appearing to the Court that all parties entitled to notice of the Trustee's motion were duly served with notice, and after a hearing, the Court being of the opinion that the authority requested by the Trustee to sell the estate's interest in the property upon the terms provided in the Motion and as modified herein and to make partial

assignment of certain defenses and claims to Pro Care of Houston, L.L.C. ("Pro Care") is in the best interest of creditors of the estates of each of the above-referenced Debtors, and that the Trustee's request for the sale to be free and clear of liens, claims and encumbrances pursuant to 11 U.S.C. §363(b) should be granted, it is therefore

ORDERED that the Trustee be, and he hereby is, authorized to enter into the Purchase Agreement (as modified by the Addendum to Purchase Agreement attached hereto as Exhibit "B") attached as Exhibit "A" to his motion for authority to sell without warranty the estate's interest in stock, a limited partnership, and two trusts, free and clear of liens, claims and encumbrances, pursuant to 11 U.S.C. §363(b), and to partially assign certain defenses and claims; it is further

ORDERED that a sale by the Trustee of the estates' interest in the property listed on Exhibit "A" attached hereto to Pro Care for the sum of Three Million and No/100 Dollars ($3,000,000.00) is hereby approved, and the Trustee is authorized to execute any and all documents necessary to effectuate such sale, to partially assign certain defenses and claims, and to otherwise carry out all other provisions of the Purchase Agreement attached as Exhibit "A" to the Trustee's motion as modified herein; it is further

ORDERED that the sale to Pro Care shall be free and clear of all liens, claims and encumbrances, pursuant to 11 U.S.C. §363(b), excluding liens, claims and encumbrances that may be held by any Lentino related entity, as that term is used in the Trustee's motion and in the purchase agreement attached as Exhibit "A" to the

Trustee's motion, but all other valid liens, claims, and encumbrances shall attach to the proceeds of the sale to the extent the property being sold is property of either of the above estates pursuant to 11 U.S.C. §541, and such respective lien, claim, or encumbrance, which has attached, shall be paid in full out of said sale proceeds; it is further

ORDERED that, except as otherwise prohibited by Title 11 of the United States Code, the sale authorized pursuant to this Order to Pro Care shall not affect the rights, if any, of third parties, including but not limited to Veldekens, Inc., Charles Veldekens and Ashraf Veldekens, to assert claims with respect to or against non-debtor entities or the stock of such non-debtor entities.

/s/ R. F. Wheless, Jr.
HONORABLE R. F. WHELESS, JR.
UNITED STATES BANKRUPTCY JUDGE

1-6-97

APPROVED AND ENTRY REQUESTED:

CAGE, HILL & NIEHAUS, L.L.P.

/s/ Theresa Mobley
LOWELL T. CAGE
TBN 03591000
THERESA MOBLEY
TBN 14238600
5851 San Felipe, Suite 950
Houston, Texas 77057
Telephone: (713) 789-0500
Telecopier: (713) 974-0344
ATTORNEYS FOR TRUSTEE

TRUE COPY I CERTIFY
ATTEST:
MICHAEL N. MILBY, Clerk

By /s/ L. Bobbitt
Deputy Clerk

EDGAR A. GOLDBERG
600 Travis, Suite 6200
Houston, Texas 77002
Telephone: (713) 229-9000
Telecopier: (713) 229-9009
ATTORNEYS FOR PRO CARE OF
HOUSTON L.L.C.

EXHIBIT A

CORPORATIONS

BAIRES, INC.

HOSPITAL ASSOCIATES, INC.

PLAZA LIFE & ENERGY, INC.

YORK PLAZA REAL ESTATET, INC.

YORK PLAZA HOSPITAL AND MEDICAL CENTER, INC.

LITTLE YORK HOSPITAL, INC.

PARTNERSHIPS AND TRUSTS

LENTINO FAMILY LIMITED PARTNERSHIP

J.L. YORK PLAZA LIVING TRUST

E.L. YORK PLAZA LIVING TRUST

EXHIBIT B

ADDENDUM TO PURCHASE AGREEMENT

Trustee and Purchaser agree that, notwithstanding the limitations on the Purchaser's use of certain property

as described in Paragraph 14 of the Purchase Agreement and specifically in addition to those limitations, Purchaser will only use income or monies generated by its operation of the hospital in payment of reasonable day-to-day operating expenses (the "Operating Expenses") of the hospital, including a reasonable administrative fee to Purchaser not to exceed fifteen percent (15%) of gross revenues of the hospital, the cost of reasonable and necessary expenses for improvements and repairs to the hospital (including but not limited to upgrading hospital facilities and equipment to meet certification requirements of the Joint Commission of Hospitals), the cost of purchasing and upgrading hospital equipment, and for the retirement of existing indebtedness of the hospital, and that to the extent income received or generated by the hospital exceeds the Operating Expenses of the hospital, such monies will be maintained in the corporation's account.

Purchaser further agrees that after Closing it shall maintain the Minimum Cash Balance of not less than seventy-five percent (75%) of the Cash Amount until the Promissory Note, including all principal and accrued interest due thereon is paid in full, unless authorized in writing by the Trustee to maintain a lesser balance for the purpose of paying the Operating Expenses or retiring existing indebtedness of the hospital.

Trustee and Purchaser further agree that no equity distribution to Purchaser, any insider or affiliate of Purchaser, or the holders of any interest in Purchaser, shall be made, nor shall any other distributions be made out of the corporation's account, except as heretofore described,

until payment in full of the purchase price described in Paragraph 6 of the Purchase Agreement.

_____

LOWELL T. CAGE, TRUSTEE

PRO CARE OF HOUSTON, L.L.C.

By: _____

Name: _____

Title: _____

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

Bankruptcy Case No. 94-45735-H2-11

Adversary No. 96-4795

COMPREHENSIVE SCHEDULING, PRETRIAL AND TRIAL ORDER

This case was filed on 11/14/96.

1. This Order shall be served by the plaintiff with the summons.

2. The plaintiff shall file no later than 90 days after the filing of this adversary case a status report which contains this information:

a. When service of the summons and complaint was accomplished;

b. Whether an answer has been served on counsel;

c. If an answer has been served, the name, address and telephone number of defendant's counsel;

d. If no answer has been received, a motion for default judgment must be attached.

3. All discovery shall be completed no later than 180 days after the date the adversary proceeding was filed.

4. All dispositive motions shall be filed no later than 180 days after the date the adversary proceeding was filed.

5. A Joint Pretrial Statement in the form attached shall be filed no later than 210 days after the date the adversary proceeding was filed. All counsel shall be responsible for the actual filing of the jointly prepared document.

6. A Pretrial Conference shall be held on August 4, 1997 at 1:30 p.m., in Courtroom No. 400 before Judge R.F. Wheless, Jr., 515 Rusk Street, Houston, Texas. Counsel who have major responsibility for the case must attend the pretrial.

7. Trial will be held the week of August 18, 1997.

8. Any changes in this schedule will only be made by further order of the court. Motions to extend these deadlines will be granted only for good cause beyond the control of the lawyers or parties in very limited circumstances.

9. Discovery dispute motions may be made formally in writing or, if the court has available time, may be dealt with by telephonic conference at the time the dispute arises.

COUNSEL ARE DISCOURAGED FROM FILING MOTIONS TO COMPEL, MOTIONS FOR PROTECTIVE ORDERS AND SIMILAR MOTIONS. IN THE EVENT SUCH A MOTION IS MADE, ORALLY OR IN WRITING, SANCTIONS SHALL, IN ALL LIKELIHOOD, BE IMPOSED AS PROVIDED IN BANKRUPTCY RULES 9011, 7037, OR 28 U.S.C. § 1927.

10. Failure to comply with any of the requirements of this order may result in sanctions being imposed on

counsel, the parties or both, which may include dismissal or entry of judgment for the opposing party.

Dated: NOVEMBER, 1996 /s/ R.F. Wheless, Jr.
R.F. WHELESS, JR.
United States
Bankruptcy Judge

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
ENTERED

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF TEXAS

JUN 06 1997

IN RE JORGE P. LENTINO, *et al.*,	§	
	§	CIVIL ACTION H-97-498
Debtors,	§	
	§	

Order

All pleadings filed by Marta Lentino in the 269th District Court of Harris County, Texas, in the case styled *Cullen v. Lentino*, are vacated because they were filed in violation of the bankruptcy stay.

Signed June 5, 1997, at Houston, Texas.

/s/ Lynn N. Hughes
Lynn N. Hughes
United States District Judge

91-18878

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS

CULLEN CENTER BANK & TRUST,	§	
	§	CIVIL ACTION H-94-3007
Plaintiff,	§	(Filed Febr. 3, 1995)
versus	§	
EDUARDO P. LENTINO, *et al.*,	§	
Defendants.	§	

ORDER TO REMAND

The removal having been an abusive misuse of the bankruptcy system, this case is remanded to the 269th Judicial District Court of Texas, Harris County (#4).

Signed January 25, 1995, at Houston, Texas.

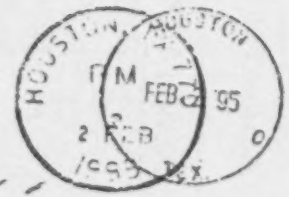
/s/ Lynn N. Hughes
Lynn N. Hughes
United States District Judge

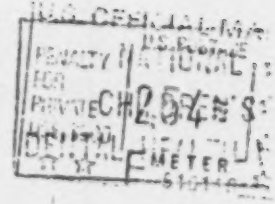
TRUE COPY I CERTIFY
ATTEST:
MICHAEL N. MILBY, Clerk

By /s/ H. Smith
Deputy Clerk

CLERK
UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
POST OFFICE BOX 61010
HOUSTON, TEXAS 77208

OFFICIAL BUSINESS
PENALTY FOR PRIVATE USE $300





Katherine Tyra
269th JDC of Harris County
301 Fannin Room 400
Houston, Tx 77002

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CERTIFIED
P 714 717 285
MAIL

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United States District Court		Southern District of Texas
In re Jorge A. Lentino,	§	Civil Action H-97-498
In re Jorge A. Lentino,	§	Civil Action H-97-500
Eduardo P. Lentino,	§	H-97-745
Marta Lentino,	§	H-97-914
Debtors.	§	H-97-915
	§	H-97-922
	§	H-97-1155
	§	(Filed July 2, 1997)

Order

1. All of the claims that Jorge Lentino, Eduardo Lentino, and Marta Lentino have asserted against Cullen Bank in Cause No. 91-18878 in the 269th District Court of Harris County, Texas, before Judge David West, are property of the estate of the debtors.

2. Marta Lentino has no authority for the estate nor does she have derivative or collateral claims in the state-court litigation.

3. Because these claims are property of the estate, every pleading that Marta Lentino has filed since the date of the petitions is void and in violation of the bankruptcy stay.

4. Marta Lentino's June filings in the 269th District Court are in violation of the automatic stay and this court's direct order to her.

5. Marta Lentino must pay the trustee $500 for the cost to the estate of having to respond to her malicious tactics.

Signed July 2, 1997, at Houston, Texas.

/s/ Lynn N. Hughes
Lynn N. Hughes
United States District Judge

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

IN RE:	§	
EDUARDO P. LENTINO, M.D.,	§	
DEBTOR	§	**CIVIL ACTION**
JORGE A. LENTINO,	§	**H-97-498**
DEBTOR	§	

ORDER AUTHORIZING RETENTION
OF SPECIAL COUNSEL

(Filed Jul. 11, 1997)

Lowell T. Cage, Trustee, is authorized to retain the attorneys below in the capacities and for the fees as stated to represent Trustee's interest in the litigation of Cause No. 91-18878, *Cullen Center Bank v. Eduardo P. Lentino, et al*, in the 269th District Court of Harris County, Texas (the "Cullen Bank litigation"), and Cause No. 93-022622, *Eduardo P. Lentino, et al v. Hirsch, Glover, Robinson & Sheiness, P.C., et al*, (the "Hirsch Glover litigation") in the 11th Judicial District Court of Harris County, Texas, respectively, pursuant to the following percentage fee arrangements:

1. *Attorneys*

The employment of the following firms and attorneys is approved:

a. Morley White and Morley White, P.C. ("White")

b. Gary S. Tradd and Gary S. Tradd, P.C. ("Tradd")

c. Neal D. Cannon, Jr. and Martin & Cannon ("Cannon")

d. Scott Rothenberg and Rothenberg & Gunn ("Rothenberg")

2. *Cullen Bank litigation*

The employment of White, Tradd, Cannon, and Rothenberg upon the terms described in the Trustee's application is approved. The contingent fee interest of the attorneys will be as follows:

Rothenberg	26.4%
White	13.2%
Tradd	13.2%
Cannon	2.2%

3. *Hirsch Glover litigation*

The employment of White, Tradd, Cannon, and Rothenberg upon the terms described in the Trustee's application is approved. The contingent fee interest of the attorneys will be as follows:

Rothenberg	12.5%
White	10%
Tradd	10%
Cannon	22.5%

4. All of the attorneys authorized to be employed are qualified and none represent an interest adverse to the estate. Their employment does not conflict with any prior representation as described in the Trustee's application or their respective affidavits.

5. All fees are subject to further order of this Court.

/s/ Lynn N. Hughes
Lynn N. Hughes
United States
District Judge

APPROVED:

/s/ Lowell T. Cage
LOWELL T. CAGE
State Bar No. 03591000
Cage, Hill & Niehaus, L.L.P.
5851 San Felipe, Suite 950
Houston, Texas 77057
Telephone: (713) 789-0500
Telecopier: (713) 974-0344

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

IN RE:	§	CASE NO. 94-45736-H2-7
EDUARDO P. LENTINO, M.D.,	§	
	§	
DEBTOR,	§	CASE NO. 94-45736-H2-7
IN RE:	§	
	§	Jointly Administered
JORGE A. LENTINO,	§	(File in Underlined Case)
DEBTOR	§	
	§	(Filed Jan. 08, 1997)

ORDER SUSTAINING OBJECTION TO CLAIM

Upon consideration of the objection of Lowell T. Cage, Trustee, to the unsecured claim in the amount of $11,390,831.30 filed in this case by Marta A. Lentino, wife of Debtor, Eduardo P. Lentino, M.D., the Court being of the opinion that the objection is well taken and should be sustained, accordingly it is

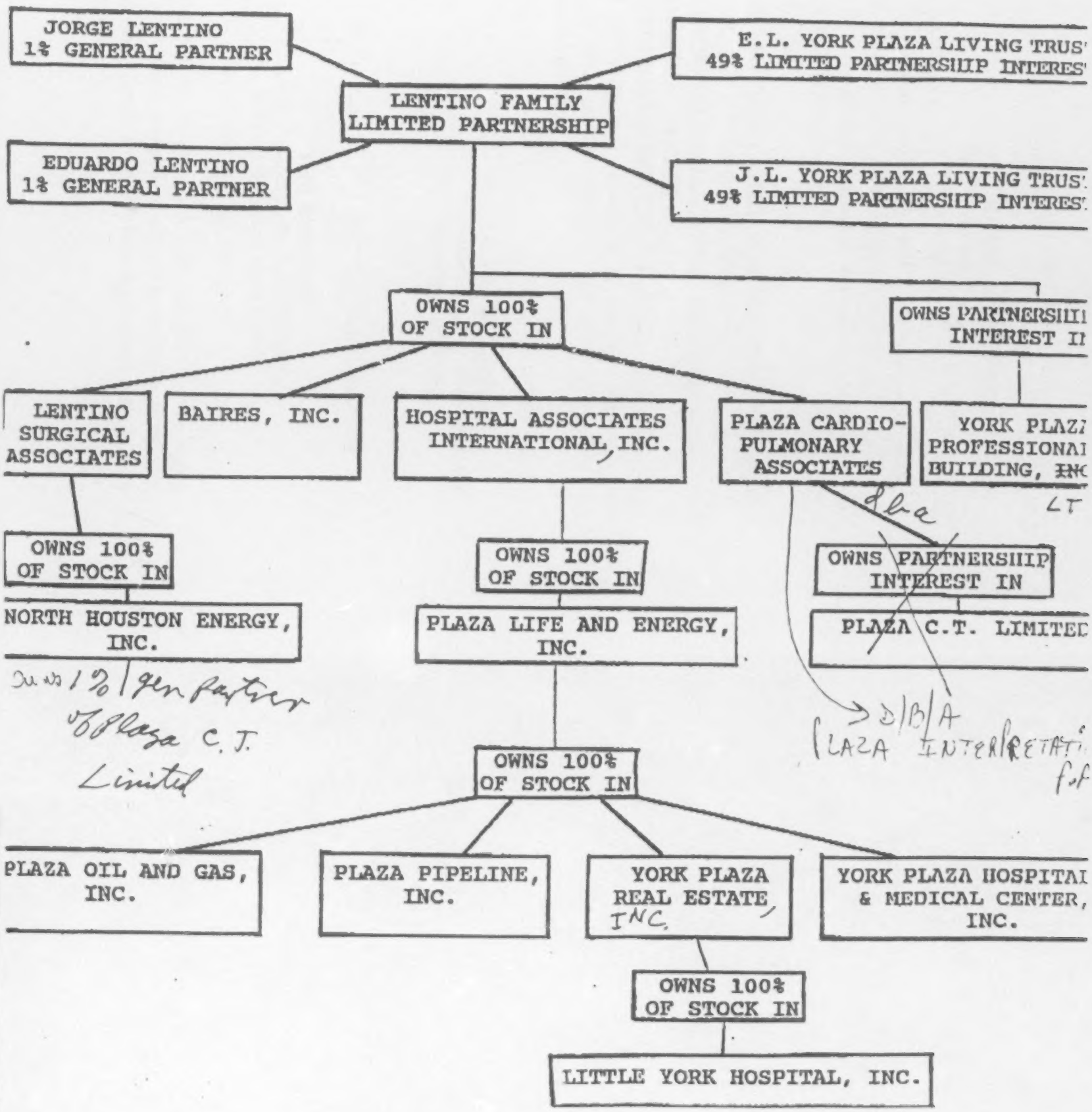
ORDERED that the unsecured proof of claim in the amount of $11,390,831.30, filed in this case by Marta A. Lentino, is disallowed.

1-6-97 /s/ R.F. Wheless, Jr.
UNITED STATES
BANKRUPTCY
JUDGE

TRUE COPY I CERTIFY
ATTEST: 1/15/97
MICHAEL N. MILBY, Clerk

By /s/ Illegible
Deputy Clerk

PARTNERSHIP, TRUST AND CORPORATE STRUCTURE
FROM JANUARY 1, 1989 TO PRESENT



App. 30

BEST AVAILABLE COPY

[LOGO]
The State of Texas
Secretary of State

The undersigned, as Secretary of State of the State of Texas, HEREBY CERTIFIES that the attached is a true and correct copy of the following described instruments on file in this office:

THE LENTINO FAMILY LIMITED PARTNERSHIP
FILE NO. 54042-10

CERTIFICATE/AGREEMENT OF NOVEMBER 28, 1988
LIMITED PARTNERSHIP

IN TESTIMONY WHEREOF, I have hereunto signed my name officially and caused to be impressed hereon the Seal of State at my office in the City of Austin, on December 6, 1996.

[SEAL]

/s/ Antonio O. Garza, Jr.
Antonio O. Garza, Jr. BAM
Secretary of State

CERTIFICATE OF LIMITED PARTNERSHIP
OF
THE LENTINO
FAMILY LIMITED PARTNERSHIP
A Texas Limited Partnership

(Filed Nov. 28, 1988)

The parties hereto do hereby certify that an Agreement was made effective the 1st day of September, 1988, at Houston, Texas, by the following, herein called "General Partners":

EDUARDO P. LENTINO
JORGE A. LENTINO

and by the following, hereinafter referred to as "Limited Partners":

E. L. YORK PLAZA LIVING TRUST
J. L. YORK PLAZA LIVING TRUST

WITNESSETH:

The parties hereto, on the date described above, formed a Limited Partnership pursuant to the provisions of the Texas State Limited Partnership Act.

1. *Name.* The Name of this Limited Partnership is:

THE LENTINO
FAMILY LIMITED PARTNERSHIP.

2. *Business.* The general character of the Partnership business shall be to hold, develop and lease real estate and equipment, and conduct a general business as thereto related.

3. *Principal Place of Business.* The location of the principal place of business of the Partnership is 2807 Little York Road, Houston, Texas 77093.

4. *Registered Agent and Registered Office.* The registered agent for service for this Limited Partnership is EDUARDO P. LENTINO whose address is 2807 Little York Road, Houston, Texas 77093.

5. *The Partners.* The General Partners and Limited Partners of this Limited Partnership are as follows:

GENERAL PARTNERS:	PLACE OF RESIDENCE:
EDUARDO P. LENTINO	2807 Little York Road Houston, Texas 77093
JORGE A. LENTINO	2807 Little York Road Houston, Texas 77093
LIMITED PARTNERS:	PLACE OF RESIDENCE:
E. L. YORK PLAZA LIVING TRUST	2807 Little York Road Houston, Texas 77093
J. L. YORK PLAZA LIVING TRUST	2807 Little York Road Houston, Texas 77093

6. *Term.* The Partnership shall begin on the 1st day of September, 1988, and shall continue for twenty-five (25) years thereafter unless sooner dissolved by law or by agreement of the parties hereto or unless extended by a majority agreement of the Partners.

7. *Additional Contributions.* No additional contributions of the Limited Partners have been agreed upon.

8. *Return of Contributions.* No Limited Partner shall be entitled to withdraw or demand the return of any part of his capital contribution except upon dissolution of the Partnership. No Limited Partner shall have the right to dissolve or terminate the Partnership except upon the affirmative vote of more than 89% in interest of all Limited Partners.

9. *Profits.* All annual net profits of the Partnership shall be divided among the General and Limited Partners in the same proportions as the Partners' then capital interest accounts, unless retained for the Partnership investment and business activities.

10. *Assignments.* A Limited Partner shall be prohibited from selling, assigning, transferring, encumbering or otherwise disposing of any interest in this Partnership, Partnership property, or assets of the Partnership, without the written consent of all of the Limited Partners, and only after such Limited Partner gives to the Partnership an opportunity to purchase such interest, as more fully explained in detail in the Partnership Agreement. The assignee or purchaser of a Limited Partnership interest shall not become a substituted Limited Partner unless all General Partners (Except the assignor) consent thereto. The seller or assignor of a Limited Partnership interest shall not have the right to make his or her purchaser or assignee a substituted Limited Partner. Furthermore, such purchaser or assignee shall not become a substitute Limited Partner unless and until all provisions of the Partnership Agreement are complied with and agreed to.

11. *Additional Limited Partners.* The General Partner may admit additional limited partners.

12. *Priority Among Limited Partners.* There is no priority of one Limited Partner over another as to the contributions or compensation by way of income.

13. *Continuance of Business.* Upon the death, retirement or insanity of the surviving General Partner, the Partnership shall dissolve unless continued by the remaining Partners and selecting when necessary a new

General Partner. If the last surviving or serving General Partner has died, retired, and/or becomes insane, then the Limited Partners holding interest in capital in excess of fifty percent (50%) of the capital owned by all Limited Partners may elect to continue the Partnership by selecting a new General Partner.

14. *Property Other Than Cash.* A Limited Partner may not demand property other than cash in return for his contributions.

15. *Amount of Cash and Agreed Value and Description of Other Property Contributed.* The Partners in the Limited Partnership have contributed their interest in the property as set forth in Schedule "A" attached hereto.

Partners	*Percentage Interest*
General Partners:	
EDUARDO P. LENTINO	1%
JORGE A. LENTINO	1%
Limited Partners:	
E. L. YORK PLAZA LIVING TRUST	49%
J. L. YORK PLAZA LIVING TRUST	49%

GENERAL PARTNERS:

/s/ Eduardo P. Lentino
EDUARDO P. LENTINO

/s/ Jorge A. Lentino
JORGE A. LENTINO

LIMITED PARTNERS:

E. L. YORK PLAZA LIVING TRUST

By: /s/ Jorge A. Lentino
JORGE A. LENTINO, Trustee

J. L. YORK PLAZA LIVING TRUST

By: /s/ Eduardo P. Lentino
EDUARDO P. LENTINO, Trustee

PLAINTIFF'S EXHIBIT A1

K810381

063-65-0456

MEMORANDUM OF TRUST OF AGREEMENT

10/31/86 00287033 K810381 $3.00

STATE OF TEXAS

COUNTY OF HARRIS

BE IT KNOWN BY ALL PERSONS that on this 15th day of October, 1986, EDUARDO P. LENTINO, as Grantor established a Living Trust Agreement known as the E L YORK, PLAZA LIVING TRUST AGREEMENT, naming JORGE A. LENTINO, as Trustee, and MARIA RAQUEL LENTINO, as Successor Trustee.

BE IT FURTHER KNOWN that anyone dealing with any of said trustees or Successor Trustees shall have the right to assume that said Trustees or Successor Trustees are acting within the scope of their authority as Trustees, and that it shall not be necessary for them to review the entire Trust Agreement.

DATED the 15th day of October, 1986.

/s/ Eduardo P. Lentino,
EDUARDO P. LENTINO,
Grantor

/s/ Jorge A. Lentino
JORGE A. LENTINO,
Trustee

STATE OF TEXAS X
X
COUNTY OF BEXAR X

BEFORE ME, PETER J. PARENTI, a Notary Public in and for the State of Texas, on this 15th day of October, 1986, did appear EDUARDO P. LENTINO, who signed

and foregoing instrument for the purposes and considerations therein expressed, and in the capacity therein stated.

/s/ Peter J. Parenti
NOTARY PUBLIC
IN AND FOR THE
STATE OF TEXAS
My Commission Expires: 1/31/89

[SEAL]

STATE OF TEXAS X
X
COUNTY OF BEXAR X

BEFORE ME, PETER J. PARENTI, a Notary Public in and for the State of Texas, on this 15th day of October, 1986, did appear JORGE A. LENTINO, who signed the foregoing instrument for the purposes and considerations therein expressed, and in the capacity therein stated.

/s/ Peter J. Parenti
NOTARY PUBLIC
IN AND FOR THE
STATE OF TEXAS
My Commission Expires: 1/31/89

[SEAL]

2711 Little York
Houston, TX 77093

FILED FOR RECORD
8:30 A.M.

OCT 31 1986

/s/ Anita Rodeheaver

County Clerk, Harris County, Texas

ANY PROVISIONS HEREIN WHICH RESTRICT THE SALE, RENTAL, OR USE OF THE DESCRIBED REAL PROPERTY BECAUSE OF COLOR, OR RACE, IS INVALID AND UNENFORCEABLE UNDER THE FEDERAL LAW.

A CERTIFIED COPY

ATTEST: FEB 07 1997
BEVERLY B. KAUFMAN, County Clerk

Harris County, Texas

/s/ Dolores T. Lopez, Deputy
DOLORES T. LOPEZ

EXHIBIT "A-1"

P519919 173-47-0206

10/25/93 00893405 P519919 $6.00

STATE OF TEXAS *
*
COUNTY OF HARRIS *

RESIGNATION OF TRUSTEE

I Eduardo P. Lentino do hereby immediately resign as trustee of the J L YORK PLAZA LIVING TRUST under trust dated the 15th day of October 1986.

This resignation is effective immediately and the successor trustee being MARIA RAQUEL LENTINO is immediately becoming the trustee of such trust as provided in Article V C. 1. of said trust agreement.

Respectfully submitted

/s/ Eduardo P. Lentino
Eduardo P. Lentino

STATE OF TEXAS *
*
COUNTY OF HARRIS *

Before me, a Notary Public, on this day personally appeared Eduardo P. Lentino, known to me to be the person whose name is subscribed to the foregoing instrument of writing and acknowledged to me that he executed the same for the purposes and considerations therein expressed.

Given under my hand and seal of office this 25th day of October, A.D. 1993.

[SEAL] **BARBARA E. TODD**
NOTARY PUBLIC
State of Texas
Comm. Exp. 07-27-96

York Plaza Hospital
Barbara Todd
2807 Little York Rd
Houston, TX 77093

/s/ Barbara E. Todd
Notary Public

ANY PROVISIONS HEREIN WHICH RESTRICT THE SALE, RENTAL, OR USE OF THE DESCRIBED REAL PROPERTY BECAUSE OF COLOR, OR RACE, IS INVALID AND UNENFORCEABLE UNDER THE FEDERAL LAW.

A CERTIFIED COPY

ATTEST: OCT 30 1996.
BEVERLY B. KAUFMAN, County Clerk
Harris County, Texas

/s/ Dolores T. Lopez, Deputy
DOLORES T. LOPEZ

EXHIBIT "E-5"

* * *

11 U.S.C. § 101 (13) "debtor" means person or municipality concerning which a case under this title has been commenced;

* * *

---

11 U.S.C. § 541. Property of the estate

(a) The commencement of a case under section 301, 302, or 303 of this title creates an estate. Such estate is comprised of all the following property, wherever located and by whomever held:

(1) Except as provided in subsections (b) and (c)(2) of this section, all legal or equitable interests of the debtor in property as of the commencement of the case.

(2) All interests of the debtor and the debtor's spouse in community property as of the commencement of the case that is –

(A) under the sole, equal, or joint management and control of the debtor; or

(B) liable for an allowable claim against the debtor, or for both an allowable claim against the debtor and an allowable claim against the debtor's spouse, to the extent that such interest is so liable.

(3) Any interest in property that the trustee recovers under section 329(b), 363(n), 543, 550, 553, or 723 of this title.

(4) Any interest in property preserved for the benefit of or ordered transferred to the estate under section 510(c) or 551 of this title.

(5) Any interest in property that would have been property of the estate if such interest had been an interest of the debtor on the date of the filing of the petition, and that the debtor acquires or becomes entitled to acquire within 180 days after such date –

(A) by bequest, devise, or inheritance;

(B) as a result of a property settlement agreement with the debtor's spouse, or of an interlocutory or final divorce decree; or

(C) as a beneficiary of a life insurance policy or of a death benefit plan.

(6) Proceeds, product, offspring, rents, or profits of or from property of the estate, except such as are earnings from services performed by an individual debtor after the commencement of the case.

(7) Any interest in property that the estate acquires after the commencement of the case.

(b) Property of the estate does not include –

(1) any power that the debtor may exercise solely for the benefit of an entity other than the debtor;

(2) any interest of the debtor as a lessee under a lease of nonresidential real property that has terminated at the expiration of the stated term of such lease before the commencement of the case under this title, and ceases to include any interest of the debtor as a lessee under a lease of nonresidential real property that has terminated at the expiration of the stated term of such lease during the case;

(3) any eligibility of the debtor to participate in programs authorized under the Higher Education Act of 1965 (20 U.S.C. 1001 et seq.; 42 U.S.C. 2751 et seq.), or any accreditation status or State licensure of the debtor as an educational institution or[1]

(4) any interest of the debtor in liquid or gaseous hydrocarbons to the extent that –

(A) the debtor has transferred or has agreed to transfer such interest pursuant to a farmout agreement or any written agreement directly related to a farmout agreement; and

(B) but for the operation of this paragraph, the estate could include such interest only by virtue of section 365 or 544(a)(3) of this title.

Paragraph (4) shall not be construed to exclude from the estate any consideration the debtor retains, receives, or is entitled to receive for transferring an interest in liquid or gaseous hydrocarbons pursuant to a farmout agreement.

(c)(1) Except as provided in paragraph (2) of this subsection, an interest of the debtor in property becomes property of the estate under subsection (a)(1), (a)(2), or (a)(5) of this section notwithstanding any provision in an agreement, transfer instrument, or applicable nonbankruptcy law –

(A) that restricts or conditions transfer of such interest by the debtor; or

(B) that is conditioned on the insolvency or financial condition of the debtor, on the commencement of a case under this title, or on the appointment of or taking possession by a trustee

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[1] So in original. Probably should be "; or".

in a case under this title or a custodian before such commencement, and that effects or gives an option to effect a forfeiture, modification, or termination of the debtor's interest in property.

(2) A restriction on the transfer of a beneficial interest of the debtor in a trust that is enforceable under applicable nonbankruptcy law is enforceable in a case under this title.

(d) Property in which the debtor holds, as of the commencement of the case, only legal title and not an equitable interest, such as a mortgage secured by real property, or an interest in such a mortgage, sold by the debtor but as to which the debtor retains legal title to service or supervise the servicing of such mortgage or interest, becomes property of the estate under subsection (a)(1) or (2) of this section only to the extent of the debtor's legal title to such property, but not to the extent of any equitable interest in such property that the debtor does not hold.

TEX. REV. CIV. STAT. ANN. Art. 6132a-1

ARTICLE 7. ASSIGNMENT OF PARTNERSHIP INTERESTS

Nature of partnership interest

Sec. 7.01. A partnership interest is personal property. A partner has no interest in specific limited partnership property.

SOURCE AND COMMENT – BAR COMMITTEE

The first sentence of Section 7.01 makes all interests in limited partnerships personal property. It is the same as RULPA § 701 and 6 Del. Code § 17-701 (1985) and is similar in substance to TULPA § 19 (for limited partners' interests) and TUPA § 26 (for general partners' interests).

* * *

Rights of judgment creditor

Sec. 7.03. (a) On application to a court of competent jurisdiction by a judgment creditor of a partner or of any other owner of a partnership interest, the court may charge the partnership interest of the partner or other owner with payment of the unsatisfied amount of the judgment, with interest, may then or later appoint a receiver of the debtor partner's share of the partnership's profits and of any other money payable or that becomes payable to the debtor partner with respect to the partnership, and may make all other orders, directions, and inquiries that the circumstances of the case require. To the extent that the partnership interest is charged in this manner, the judgment creditor has only the rights of an assignee of the partnership interest.

11 U.S.C. § 101 (41) "person" includes individual, partnership, and corporation, but does not include governmental unit, *Provided, however,* That any governmental unit that acquires an asset from a person as a result of operation of a loan guarantee agreement, or as receiver or liquidating agent of a person, will be considered a person for purposes of section 1102 of this title.[2]

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11 U.S.C. § 363 (f) The trustee may sell property under subsection (b) or (c) of this section free and clear of any interest in such property of an entity other than the estate, only if –

(1) applicable nonbankrutpcy law permits sale of such property free and clear of such interest;

(2) such entity consents;

(3) such interest is a lien and the price at which such property is to be sold is greater than the aggregate value of all liens on such property;

(4) such interest is in bona fide dispute; or

(5) such entity could be compelled, in a legal or equitable proceeding, to accept a money satisfaction of such interest.

* * *

F.R.B.P. Rule 7019. Joinder of Persons Needed for Just Determination

Rule 19 F.R.Civ.P. applies in adversary proceedings, except that (1) if a person joined as a party raises the defense that the bankruptcy court lacks jurisdiction over the subject matter and the defense is sustained, the court shall dismiss such person from the adversary proceedings and (2) if a person joined as a party properly and timely raises the defense of improper venue, the court shall determine, as provided in 28 U.S.C. § 1477, whether that part of the proceeding involving the joined party shall be retained or transferred to another district, or whether the entire adversary proceeding shall be transferred to another district.

* * *

F.R.B.P. Rule 7019. Joinder of Persons Needed for Just Determination

Rule 19 F.R.Civ.P. applies in adversary proceedings, except that (1) if an entity joined as a party raises the defense that the court lacks jurisdiction over the subject matter and the defense is sustained, the court shall dismiss such entity from the adversary proceeding and (2) if an entity joined as a party properly and timely raises the defense of improper venue, the court shall determine, as provided in 28 U.S.C. § 1412, whether that part of the proceeding involving the joined party shall be transferred to another district, or whether the entire adversary proceeding shall be transferred to another district.

(As amended Mar. 30, 1987, eff. Aug. 1, 1987.)

F.R.B.P. Rule 9006 (f) Additional time after service by mail

When there is a right or requirement to do some act or undertake some proceedings within a prescribed period after service of a notice or other paper and the notice or paper other than process is served by mail, three days shall be added to the prescribed period.

* * *

Subdivision (f) is new and is the same as Rule 6(e) F.R.Civ.P.

* * *

(f) Additional time after service by mail

When there is a right or requirement to do some act or undertake some proceedings within a prescribed period after service of a notice or other paper and the notice or paper other than process is served by mail, three days shall be added to the prescribed period.

(As amended Mar. 30, 1987, eff. Aug. 1, 1987; Apr. 25, 1989, eff. Aug. 1, 1989; Apr. 30, 1991, eff. Aug. 1, 1991; Apr. 23, 1996, eff. Dec. 1, 1996.)

11 U.S.C. § 362. Automatic stay

(a) Except as provided in subsection (b) of this section, a petition filed under section 301, 302, or 303 of this title, or an application filed under section 5(a)(3) of the Securities Investor Protection Act of 1970 (15 U.S.C. 78eee(a)(3)), operates as a stay, applicable to all entities, of –

(1) the commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced before the commencement of the case under this title, or to recover a claim against the debtor that arose before the commencement of the case under this title;

(2) the enforcement, against the debtor or against property of the estate, of a judgment obtained before the commencement of the case under this title;

(3) any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate;

(4) any act to create, perfect, or enforce any lien against property of the estate;

(5) any act to create, perfect, or enforce against property of the debtor any lien to the extent that such lien secures a claim that arose before the commencement of the case under this title;

(6) any act to collect, assess, or recover a claim against the debtor that arose before the commencement of the case under this title;

(7) the setoff of any debt owing to the debtor that arose before the commencement of the case

under this title against any claim against the debtor; and

(8) the commencement or continuation of a proceeding before the United States Tax Court concerning the debtor.

(a) Except as provided in subsection (b) of this section, a petition filed under section 301, 302, or 303 of this title, or an application filed under section 5(a)(3) of the Securities Investor Protection Act of 1970, operates as a stay, applicable to all entities, of –

* * *

FEBRUARY 29, 1996.

(LOGO)

JUDGMENT

The Fourteenth Court of Appeals

MARTA A. LENTINO, EDUARDO P. LENTINO, AND JORGE A. LENTINO, APPELLANTS

NO. 14-94-00175-CV V.

CULLEN CENTER BANK AND TRUST, APPELLEE

This cause, an appeal from the partial summary judgment and jury verdict in favor of appellee, Cullen Center Bank and Trust signed October 26, 1993, came on to be heard on the transcript of the record. We have inspected the record and find error in the judgment. We therefore order the judgment of the court below REVERSED and REMAND the cause for proceedings in accordance with the court's opinion.

We order appellee, Cullen Center Bank and Trust, jointly and severally, to pay all costs incurred because of this appeal.

We order this decision certified below for observance.

Reversed and Remanded; opinion filed February 29, 1996.

(LOGO)

In The

Fourteenth Court of Appeals

NO. 14-94-00175-CV

MARTA A. LENTINO, EDUARDO P. LENTINO, AND JORGE A. LENTINO, Appellants

V.

CULLEN CENTER BANK AND TRUST, Appellee

On Appeal from the 269th District Court
Harris County, Texas
Trial Court Cause No. 91-18878

OPINION

Appellants, Marta A. Lentino, Eduardo P. Lentino, M.D., and Jorge A. Lentino, M.D., appeal from a partial summary judgment and jury verdict in favor of appellee, Cullen Center Bank and Trust. Appellants bring six points of error, contending: (1) the trial court improperly granted appellee's motion for partial summary judgment; and (2) the trial court erred by overruling appellants' motion to modify, correct, or reform the judgment when there was insufficient evidence or no evidence to support the jury's verdict. Appellants also request that in the event this case is reversed and remanded, this Court

reverse the awards of prejudgment and postjudgment interest, attorney's fees, costs of court, and several postjudgment orders by the trial court relating to the seizure of appellants' property. We reverse and remand for a trial on the merits.

In November 1982, Eduardo and Jorge Lentino individually executed separate promissory notes for $150,000 to appellee in order to finance their bank stock purchases. Both notes were renewed in November 1983. On December 14, 1984, Eduardo and Jorge Lentino and four other parties, jointly and severally, executed a new promissory note to appellee in the original amount of $2,252,250. Also on that day, Eduardo and Jorge Lentino executed guarantee agreements in favor of Cullen that unconditionally guaranteed payment of the $2,252,250 note. Appellee advanced no additional funds to appellants as consideration for increasing their obligation.

In February 1986, appellee filed individual suits against Jorge and Eduardo Lentino for default on the December 1984 note, which matured on November 30, 1985. In March 1987, both Eduardo and Jorge Lentino entered into separate compromise settlement agreements with appellee. According to the terms of these agreements, Eduardo and Jorge agreed to execute new promissory notes to pay appellee $148,842 and $171,186.29, respectively. The compromise settlement agreements further provided that: (1) appellee would pay Eduardo and Jorge each $10 and release them of their joint and several liability under the 1984 note and guaranty agreements; (2) if Eduardo or Jorge defaulted on their notes, the defaulting party could be liable for the outstanding balance on the original 1984 note; and (3) Eduardo and Jorge waived

all affirmative defenses and causes of action relating to the loan documents in the underlying lawsuit.

Both Eduardo and Jorge subsequently defaulted on their 1987 notes, and in 1990, appellee filed separate lawsuits to collect on these notes. The trial court entered final judgments in favor of appellee and awarded actual damages, prejudgment interest, attorneys fees, costs of court, and postjudgment interest. During postjudgment discovery, however, appellee allegedly discovered fraudulent transfers by Jorge, Eduardo and Marta Lentino made during the time the compromise settlement agreements were executed. Appellee subsequently filed this suit, claiming fraud, fraudulent transfers, breach of contract, conspiracy, negligence, and negligent misrepresentation. The appellants responded with a general denial and asserted several affirmative defenses, including usury. The appellants also filed counterclaims alleging usury, slander of title, unreasonable collection efforts, and intentional infliction of emotional distress.

In June 1993, Cullen filed a motion for partial summary judgment, requesting the trial court to hold that the compromise settlement agreements barred appellants' "affirmative causes of action" which relate to the underlying loan documents. Following the appellants' response, appellee filed its reply, clarifying that the compromise settlement agreement barred all of the Lentinos' claims *and* affirmative defenses. *See Stiles v. Resolution Trust Corp.*, 867 S.W.2d 24, 26 (Tex. 1993) (indicating that specific grounds for summary judgment may be stated in movant's reply in order to comply with rule of civil procedure 166a(c)). The trial court subsequently granted appellee's motion and held the compromise settlement

agreements barred all of appellants' causes of action and affirmative defenses.

The parties proceeded to trial and at the close of evidence, the trial court directed a verdict in favor of appellee as to its claims for breach of the compromise settlement agreements. The trial court also rendered judgment on the jury's verdict, which addressed other issues, and awarded $1,817,525.42 in actual damages and $2,500,000 in exemplary damages against each Jorge and Eduardo Lentino, along with attorneys' fees, prejudgment interest, postjudgment interest and costs of court.

In their first point of error, appellants contend the trial court improperly granted appellee's motion for partial summary judgment, in part, because a fact issue exists as to whether the 1984 note was usurious. Appellants argue that if the 1984 note was usurious, the compromise settlement agreements were void because they failed to purge the usury contained in the 1984 note. *See Commerce Trust Co. v. Ramp*, 138 S.W.2d 531, 534 (Tex. 1940), *overruled on other grounds*, 561 S.W.2d 777 (Tex. 1977); *see also* TEX. REV. CIV. STAT. ANN. art. 5069-1.02 (Vernon 1987) (stating that all usurious contracts are contrary to public policy); *Ferguson v. Tanner Development Co.*, 541 S.W.2d 483, 493 (Tex. Civ. App. – Houston [1st Dist.] 1976), *rev'd on other grounds*, 561 S.W.2d 777 (Tex. 1977) (stating that contracts which are contrary to public policy are void). Accordingly, appellants maintain that no summary judgment could be based on a void instrument.

The movant for summary judgment has the burden to show that no genuine issues of material fact exist and that it is entitled to judgment as a matter of law. *Nixon v. Mr.*

Property Management Co., 690 S.W.2d 546, 548-49 (Tex. 1985). In deciding whether there is a disputed material fact issue precluding summary judgment, proof favorable to the non-movant must be taken as true. *Id.; O'Bryant v. Century 21 S. Cent. States*, 899 S.W.2d 270, 271 (Tex. App. – Houston [14th Dist.] 1995, no writ). Further, we indulge every reasonable inference in favor of the non-movant and resolve any doubts in his favor. *O'Bryant*, 899 S.W.2d at 271; *Edwards v. Garcia-Gregory*, 866 S.W.2d 780, 783 (Tex. App. – Houston [14th Dist.] 1993, writ denied). If the movant's motion and summary judgment proof facially establishes his right to judgment as a matter of law, then the burden shifts to the non-movant to raise fact issues precluding summary judgment. *See City of Houston v. Clear Creek Basin Auth.*, 589 S.W.2d 671, 678 (Tex. 1979). Moreover, if the non-movant relies on an affirmative defense to defeat summary judgment, he must present summary judgment proof sufficient to raise a fact issue as to each element of that defense. *Brownlee v. Brownlee*, 665 S.W.2d 111, 112 (Tex. 1984); *see also Wilson v. General Motors Acceptance Corp.*, 897 S.W.2d 818, 823 (Tex. App. – Houston [1st Dist.] 1994, no writ).

The essential elements of a usurious transaction are: (1) a loan of money; (2) an absolute obligation to repay the principal; and (3) the exaction of a greater compensation than allowed by law for the use of the money by the borrower. *First Bank v. Tony's Tortilla Factory*, 877 S.W.2d 285, 287 (Tex. 1994); *Holley v. Watts*, 629 S.W.2d 694, 696 (Tex. 1982); *Blasdell v. Catalina*, 858 S.W.2d 653, 655 (Tex. App. – Houston [14th Dist.] 1993), *rev'd on other grounds*, 881 S.W.2d 295 (Tex. 1994). In the present case, neither side disputes that appellee loaned Eduardo and Jorge

Lentino only $150,000 each, with obligations to repay the entire amounts. Appellee, however, contends that appellants failed to present sufficient summary judgment proof demonstrating usurious interest.

In support of its argument, appellee relies heavily on *Sorrells v. Gilberson*, 780 S.W.2d 936, 938 (Tex. App. – Austin 1989, writ denied), which stands for the proposition that a possessor of a promissory note who *moves* for summary judgment against the maker of the note must present certain proof to establish he is entitled to judgment as a matter of law. Specifically, the possessor of a note must either: (1) include the note in the summary judgment proof; or (2) establish the terms of the note by affidavit or other proper summary judgment proof. *Id.* Appellee now contends that appellants' proof was insufficient to support their usury defense because: (1) the 1982 and 1983 notes were absent from the summary judgment record; and (2) appellants' affidavits failed to state the relevant terms of the 1982 and 1983 notes. *See id.*

Upon review of the record, however, we find *Sorrells* to be inapposite. In the present case, appellants were the *non-movants*, and thus, their only burden was to demonstrate a fact issue as to each element of their usury defense. *See Brownlee*, 665 S.W.2d at 112. Unlike the *movant* for summary judgment in *Sorrells*, appellants were not required to establish conclusively each element of their defense. Accordingly, appellants were not required to show the terms of the notes, such as payment schedule, maturity date, interest rate, default provisions, acceleration terms, and notice, demand and presentment requirements to preclude partial summary judgment. As we

discuss below, the proof presented by appellants sufficiently established a fact issue as to the existence of usurious interest. That should have precluded partial summary judgment.

When a lender requires, as a condition to making a loan, that a borrower assume a third party's debt, such debt must be included in the interest computation to determine usury. *Alamo Lumber Co. v. Gold*, 661 S.W.2d 926, 928 (Tex. 1983). In this case, the summary judgment record shows that as a condition to renew appellants' 1983 notes, appellee required them to sign the 1984 note, making them jointly and severally liable with third parties for $2,252,250. The record also shows that: (1) the 1984 note had a one-year maturity; and (2) appellee did not advance additional funds to appellants other than the original $150,000 loan made in 1982. Thus, although the interest rates on the 1982 and 1983 notes are not in the record, appellants' computed interest on the 1984 note under *Alamo Lumber* would likely exceed two million dollars for one year, even though appellants never received more than $150,000 from appellee.

Further, the maximum lawful rate of interest for a contract is 24% per annum. Tex. Rev. Civ. Stat. Ann. art. 5069-1.04(a), (b)(1) (Vernon 1987). Interest rates exceeding the maximum lawful rate are deemed to be usurious. *See* Tex. Rev. Civ. Stat. Ann. art. 5069-1.02 (Vernon 1987). Therefore, we find that there is, at least, a fact issue as to whether the 1984 note obligated appellants to pay interest

exceeding the maximum lawful rate.[1] *See also Catalina v. Blasdel*, 881 S.W.2d 295, 296 (Tex. 1994) (stating that usury is a question of fact when not evident from the face of the instrument); *Dryden v. City Nat'l Bank of Laredo*, 666 S.W.2d 213, 216 (Tex. App. – San Antonio 1984, writ ref'd n.r.e.) (stating that usury, where not apparent from the face of the instrument, is a question of fact for the jury). Appellee, nonetheless, argues that even if a fact issue exists, partial summary judgment was proper because the 1987 compromise settlement agreements released any claims or defenses that the appellants may have had for usury under the 1984 note. We disagree.

A claim or defense of usury may be compromised and released if done in good faith and if the settlement instrument is purged of the usury contained in the underlying note. *See Finn v. Alexander*, 163 S.W.2d 714, 716 (Tex. 1942); *Ramp*, 138 S.W.2d at 534. For this to occur, there must be: (1) cancellation of the obligation tainted by the usury; and (2) the creation of a new obligation free of

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[1] If we apply the maximum lawful interest rate for contracts, compounded annually for two years, and assume that Eduardo and Jorge Lentino failed to make any payments on their 1982 notes, our calculations show that each would owe appellee $222,000 at the time they signed the 1984 note for $2,250,000. Because the 1984 note had a one year maturity, under *Alamo Lumber*, the Lentinos' computed interest charge would have been approximately $2,028,000 each for one year. This amount, notwithstanding the interest owed by the Lentinos on the 1984 note itself, clearly exceeds the maximum lawful rate for contracts, and therefore, would be usurious. Although these calculations incorporate certain assumptions, they, nonetheless, illustrate the existence of a fact issue as to appellant's usury defense.

usury. *See Southwestern Inv. Co. v. Hockley County S. & D., Inc.*, 516 S.W.2d 136, 137 (Tex. 1974); *Ramp*, 138 S.W.2d at 534; *O'Quinn v. Beanland*, 540 S.W.2d 526, 527 (Tex. Civ. App. – San Antonio 1976, no writ). On the other hand, when the original usurious obligation transcends into the subsequent agreement, such agreement is void and unenforceable. *See Ramp*, 138 S.W.2d at 535.

Under the terms of the compromise settlement agreement, both Jorge and Eduardo Lentino agreed to execute new promissory notes payable to appellee. In return, appellee paid Jorge and Eduardo $10 each and agreed to release them from their joint and several liability under the 1984 note and guaranty agreements. The agreement also provided, however, that if either Jorge or Eduardo defaulted on their notes, the defaulting party, at appellee's sole option, could be liable for the entire outstanding balance on the 1984 note. Because we find that a fact issue exists as to whether the 1984 note was usurious, we are unable to determine whether the compromise settlement agreement carried forward the usury contained in the 1984 note, and thus, was void and unenforceable. Accordingly, appellants' first point of error is sustained.

In points two through five, appellants attack the legal and factual sufficiency of the evidence as it relates to their alleged breaches of the compromise settlement agreements. However, given our disposition of appellants' first point, we need not address the merits of these issues.

In their sixth point of error, appellants request that, in the event this case is reversed and remanded, this

Court reverse the awards of prejudgment and postjudgment interest, attorney's fees, costs of court, and several post judgment orders by the trial court relating to the seizure of appellants' property. We decline their request and reverse and remand this case for a trial on the merits.

/s/ Paul C. Murphy
Chief Justice

Judgment rendered and Opinion filed February 29, 1996.

Panel consists of Chief Justice Murphy, and Justices Anderson and Fowler.

Publish – TEX. R. APP. P. 90.

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February 21, 1997

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RE: Case Number 96-0487

Style: CULLEN CENTER BANK & TRUST

v.

LOWELL T. CAGE, CHAPTER 7 TRUSTEE OF THE BANKRUPTCY ESTATES OF EDUARDO P. LENTINO, M.D., and JORGE A. LENTINO, M.D., DEBTORS, and MARTA LENTINO

Dear Counsel:

Today, the Supreme Court of Texas overruled both motions for rehearing of the application for writ of error in the above styled case. (Chief Justice Phillips not sitting.)

Sincerely,

John T. Adams, Clerk
by /s/ Michael C. Murphey
Michael C. Murphey, Deputy